82-1157

Supreme Court, U.S.
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No.

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1983

LAWRENCE A. MEACHUM, et al,
Petitioner,

V.

NORMAN LONGVAL,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a defendant's subjective perception of possible vindictiveness is the proper standard by which to determine a Due Process violation in a habeas corpus proceeding brought by a state prisoner where the state court has found nothing inappropriate in either the judge's remarks or the sentence imposed?

PARTIES

Lawrence R. Meachum and Fred Butterworth were named as respondents below. Normal L. Longval was the petitioner in the Court below.

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PETITION FOR WRIT OF CERTIORARI

The petitioner prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the court below on remand from the Supreme Court of the United States, Longval v. Meachum, No.

80-1503 (App. A) is not yet reported. The order of this court, vacating the earlier judgment of the Court of Appeals issued on June 28, 1982. Meachum v. Longval, No. 81-261. The earlier opinion of the Court of Appeals is reported at 651 F.2d. 818 (1st Cir. 1981). (App. B). The opinion of the Supreme Judicial Court, Commonwealth v. Longval is reported at 378 Mass. 246, 390 N.E.2d 1117 (1979). (App. C).

JURISDICTION

The decision of the court below was rendered on November 24, 1982. The mandate was stayed until January 17, 1983, pending the application to this Court for a writ of certiorari. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOKED

Fourteenth Amendment

Section 1. ... nor shall any State deprive any person of life, liberty or property, without due process of law ... .

STATEMENT OF THE CASE

This second petition for writ of certiorari challenges the decision of the Court of Appeals for the First Circuit on remand from the Supreme Court of the United States.

This matter commenced on September 8, 1975, when Norman Longval and two others were indicted for armed robbery, assault by means of a dangerous weapon, unlawfully carrying a sawed off shotgun, and using a motor vehicle without authority.

Prior to trial, one co-defendant (Ellard) pled guilty and was sentenced as follows: two years at a House of Correction for assault by means of a dangerous weapon, one year in a House of Correction for using a motor vehicle without authority to be served from and after the first sentence and three years probation on one armed robbery charge to run from and after the second sentence. The remaining indictments were filed.

Longval and the remaining co-defendant were tried before a jury. The co-defendant was acquitted. Longval was convicted on all indictments and was sentenced as follows: concurrent terms of thirty-two to forty years at Massachusetts Correctional Institution, Walpole on the armed robbery charges, concurrent terms of eight to ten years on the assault and gun carrying charges

to run from and after the sentences for armed robbery. The motion vehicle charge was filed.

Longval appealed his sentence to the Appellate Division of the Superior Court. His sentences were reduced as follows: concurrent terms of thirty to forty years on the armed robbery charges and lesser terms as to the other sentences, all to be served concurrently with the armed robbery sentence.

On his appeal pursuant to G.L. c. 278, §§33A-G, Longval assigned one error dealing with the disparity between his sentences and those given Ellard.

Subsequently Longval filed a petition for a writ of error in the Supreme Judicial Court attacking his sentences and referring to matters outside the record on appeal. A Single Justice of the Court ordered that the

record on appeal be expanded to include the transcript of co-defendant Ellard's plea and sentencing and to include a report of a Special Master of the substance of an unrecorded lobby conference between the sentencing judge and counsel. After hearing, the Special Master had found that in the unrecorded conference during the presentation of the Commonwealth's case, the trial judge said to Longval's counsel:

> "[T]he evidence in this case as it is coming in is very serious -- robbery of a drug store, taking (i.e. theft of) drugs, use of a shot gun. I am wondering if you and the Commonwealth have had any discussion regarding a plea (of guilty). I strongly suggest that you ask your client to consider a plea, because, if the jury returns a verdict of guilty, I might be disposed to impose a substantial prison

> sentence. You know that I am capable of doing that because you know of the sentences in a previous trial."

Report of Special Master and Commissioner, 3-4 (App. D). Subsequently the Supreme Judicial Court affirmed the judgments of conviction. Commonwealth v. Longval, 378 Mass. 246, 390 N.E.2d 1117 (1979).

Thereafter Longval filed, pro se, a petition for writ of habeas corpus in the United States District Court for the District of Massachusetts alleging that his state conviction and sentence were obtained in violation of the Sixth and Fourteenth Amendments of the United States Constitution. Counsel was appointed and, on May 7, 1980, after a hearing, the petition was dismissed. On May 20, 1980, the district court refused

to certify that there was probable cause to prosecute an appeal.[1/]

On June 19, 1981, the Court of Appeals reversed the district court and ordered

> "The writ of habeas corpus shall issue unless within sixty days the defendant is resentenced before a Massachusetts Superior Court Justice, other than the one who presided at his trial."

1/ In denying the application the Court noted the following:

> "I refuse to certify that there is probable cause to prosecute the appeal. At argument counsel for the plaintiff asserted that the basis for his claim was that a pretrial statement of the trial judge "chilled his right" to a jury trial. The petitioner however elected to proceed by jury trial and was found guilty by a jury. In my opinion this application and their present appeal are frivolous."

Longval v. Meachum, 651 F.2d 818 (1st Cir. 1981). (App. B).

The mandate of the court was stayed until August 10, 1981 pending the filing of a petition for writ of certiorari.

Petitioner filed a petition for writ of certiorari which was granted and the judgment of the Court of Appeals was vacated, and the case remanded for further consideration in light of United States v. Goodwin, 457 U.S. ___ (1982) (Slip. Op. No. 80-2195). Meachum v. Longval, No. 81-261 (June 28, 1982). After further submission of briefs and oral argument, the Court of Appeals again ordered that "[t]he writ of habeas corpus shall issue unless within sixty days the defendant is resentenced before a Massachusetts Superior Court Justice other than the one who presided at trial."

On petitioner's motion the mandate was stayed until January 17, 1983 pending the instant filing of a petition for writ of certiorari.

REASONS FOR GRANTING REVIEW

INTRODUCTION

The decision of the Court of Appeals arises not in the context of the court's exercise of its supervisory powers over actions of lower federal trial judges, but in the context of a state prisoner's habeas corpus petition. It is suggested that the federal court's jurisdiction over state criminal trials should be, and indeed is, limited to those instances in which fundamental error violating a specific constitutional guarantee has been committed in a state trial court and gone unreviewed under proper constitutional standards by the highest state court. Such is not the

instant case. This case therefore involves a substantial question involving the scope of permissible interference by a federal court in a state's ability to regulate its own criminal trials.

The second reason for granting certiorari is that the Court of Appeals for the First Circuit has misapplied the standard to be applied in evaluating a judicial response to a criminal defendant's exercise of a right to jury trial as enunciated by this Court in United States v. Goodwin, ___ U.S. ___, 102 S.Ct. 2485 (1982).

I. THE FIRST CIRCUIT COURT OF APPEALS HAS ABUSED ITS HABEAS CORPUS JURISDICTION IN CONFLICT WITH THIS COURT'S DECISIONS IN SUMNER V. MATA, 449 U.S. 539 (1981), SUMNER II, ___ U.S. ___, 102 S.Ct. 1303 (1982) AND DONNELLEY V. DeCHRISTOFORO, 416 U.S. 637 (1974).

In both Sumner and Sumner II, this court made clear that in a proceeding

pursuant to 28 U.S.C. §2254 a state court's findings of fact, made by either a trial or appellate court, are to be accorded a presumption of correctness, unless the federal court explains why it has not done so. In the instant case, the federal court has merely substituted its own view of the trial judge's statement. At a hearing in the state court, the Special Master found:

> "Nothing in the context of the conference as described to me in testimony led me to construe the judge's remarks as in any sense a threat, but merely as a statement to a young lawer of the judge's then general impression of the evidence as it had developed to that point."
>
> Report of the Special Master and Commissioner, 4.

The Supreme Judicial Court, in construing the remarks, found:

> "We do not read the words of the judge quoted supra as supporting an inference of such punishment or threat of punishment. His words directed the attention of defense counsel to sentences he had imposed in other unrelated cases; they commented on the serious nature of the offense as shown in the evidence at trial; and they advised the defendant, through his counsel, not to forego any advantage that might accrue to the defendant by means of plea bargaining and a resulting recommendation to the Court by the prosecution, as to the sentence.
>
> There was nothing inappropriate in these comments by the judge." Commonwealth v. Longval, 378 Mass. 246, 251-252 (1979) N.E.2d 1117 (1979).

However, it is only by outright rejection of the state court's findings that the federal court is able to elevate the issue to one of

constitutional dimension. In both decisions the Court of Appeals substitutes its characterization of the judge's remarks - a "plea or else" "attempt to coerce," (Longval, II at 3), for the state court's findings. The Court of Appeals has therefore violated the principles governing habeas corpus review enunciated in Sumner v. Mata, I & II, supra.

Moreover, the approach taken by the Court of Appeals is analogous to that disapproved by this Court in Donnelley v. DeChristoforo, 416 U.S. 637 (1974). In DeChristoforo the Court of Appeals had noted that its review was "the narrow one of due process, and not the broad exercise of supervisory power that [it] would possess in regard to [its] own trial court." DeChristoforo v. Donnelley, 473 F.2d 1236, 1238 (1973).

However, the Court of Appeals then proceeded to substitute its interpretation of a prosecutor's remarks for the interpretation given by the state court and finding fundamental error, granted the habeas petition. This court reversed, noting the fundamental principle that "not every trial error or infirmity which might call for application of supervisory powers correspondingly constitutes a 'failure to observe that fundamental fairness essential to the very concept of justice' Lisenba v. California, 314 U.S. 219, 236 (1941)" Donnelley v. DeChristoforo at 642. This Court found no fundamental error in the prosecutor's remarks.

In DeChristoforo, as in the instant case, the State has not denied the defendant the benefit of a specific

constitutional right, nor could the court's remarks be reasonably construed to have infected the trial itself rendering the conviction fundamentally unfair. It should be noted that the defendant never offered to plead guilty; he exercised his right to a jury trial and received a sentence for which the Supreme Judicial Court found "ample justification," Commonwealth v. Longval, 390 N.E.2d at 1121. The alleged impropriety, it is submitted, does not rise to a level of constitutional significance appropriate for habeas corpus review.

II. THE COURT OF APPEALS HAS FAILED TO PROPERLY APPLY UNITED STATES V. GOODWIN, ___ U.S. ___, 102 S.Ct. 2485 (1982).

In United States v. Goodwin, ___ U.S. ___, 102 S.Ct. 2485 (1982), this court held that a pretrial substitution of felony for misdemeanor charges after

a defendant claimed a jury trial did not give rise to a presumption of prosecutorial vindictiveness. The court distinguished between pretrial and posttrial charging decisions and explicitly limited the presumption of vindictiveness established by Blackledge v. Perry, 417 U.S. 21 (1974) and North Carolina v. Pearce, 395 U.S. 711 (1969) and to posttrial decisions.

In Goodwin, the court found that there was no evidence in [that] case that could give rise to a claim of actual vindictiveness ..." the court stated, "[t]he conviction in this case may be reversed only if a presumption of vindictiveness applicable in all cases - is warranted. 102 S.Ct. 2485, (1982). This court held that a presumption of vindictiveness was not warranted. The court refused to extend the scope of Pearce and Blackledge, asserting, "...

the institutional bias against retrial of a decided question that supported the decisions in Pearce and Blackledge simply has no counterpart in this case." (Footnote omitted). 102 S.Ct. at 2494.

However, although this court rejected the presumption of vindictiveness standard in Blackledge v. Perry and required proof of actual malice, the Court of Appeals, on remand, totally ignored the distinction drawn by this court. The Court of Appeals instead applied the Blackledge standard, stating "Whatever his actual state of mind, or purpose, we regard the judge's mid-trial interjections as susceptible of appearing from the defendant's perspective to be an attempt to coerce him to plead." The court rejected a rule requiring a prima facie showing of actual malice and ignored this court's

limitation on the presumption of vindictiveness to the precise situation presented in Blackledge. The decision below is in complete conflict with this Court's decision in Goodwin. See also, Moon v. Maryland, 398 U.S. 319, 321 (1970) (certiorari dismissed as unprovidently granted where petitioner did not allege that the judge was vindictive).

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be allowed.

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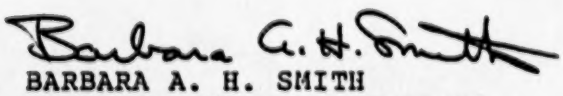

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 80-1503

NORMAN L. LONGVAL,
Petitioner, Appellant,

v.

LAWRENCE R. MEACHUM, ET AL.,
Respondents, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Walter Jay Skinner,
U.S. District Judge]

ON REMAND FROM THE SUPREME COURT

Before
Coffin, Chief Judge,
Aldrich and Bownes, Circuit Judges.

Judge Leubsdorf, Associate Professor of Law, Court appointed counsel, for appellant.

Barbara A. H. Smith, Assistant Attorney General, Chief, Criminal Appellate Division, with whom Francis X. Bellotti, Attorney General, was on brief for appellees.

November 24, 1982

ALDRICH, Senior Circuit Judge. The Supreme Court, on petition for certiorari in this habeas corpus proceeding, vacated the judgment resulting from our earlier opinion, Longval v. Meachum, 651 F.2d 818, (1st Cir. 1981), and remanded for further consideration in the light of Goodwin v. United States, U.S. , 102 S.?Ct. 2485 (1982). Following remand, we called for brief and heard oral argument. Unhappily, we think that because of a collateral remark in our opinion, seized upon by respondents, the issue in this case may have been misunderstood by the Court.

In respondent's petition for certiorari a given ground was,

> "The court further held that since the trial judge's participation in plea bargaining raises the 'possible appearance of vindictiveness' the case need be remanded for sentencing by a judge other than the one who presided at trial." (Emphasis suppl.)

In point of fact, this is not a plea bargaining case. The respondents had no basis for so indicating except that we quoted from a plea bargaining case[1/] in support of our conclusions. Rather, this is a case where there had been no bargaining, and the trial court, sua sponte, informed the defendant that if he did not follow its advice to bargain and plead, it "might be disposed to impose a substantial sentence" if the jury convicted him.

Concedely it is true that we spoke once in terms of "a possible appearance of vindictiveness," which, standing alone, might be misinterpreted. A fair account, however, would have noted that our meaning was what that appearance led to, viz., "a reasonable apprehension of vindictiveness,"

1/ United States v. Werker, 535 F.2d 198, 203 (2d Cir.), cert. denied, 429 U.S. 926 (1976). See 651 F.2d at 821.

the phrase used in Blackledge v. Perry, 1974, 417 U.S. 21, at 28, and which we quoted three times. The substance of our opinion was that the trial judge's apparent attitude, whatever his actual intent, had unconstitutionally created this apprehension, and that this was in no way dissipated by the sentences thereafter imposed. We fully accept the Court's guidance in Goodwin that recovery on the basis of a reasonable apprehension of vindictiveness also requires that the situation be one in which, in general, there is a "reasonable likelihood of vindictiveness," and we reaffirm our conclusion that this was such a situation.

The undisputed facts are that near the close of the prosecution's case the trial judge addressed defense counsel essentially as follows:

> "Mr. Primason, the evidence in this case as it is coming in is very serious -- robbery of a drug store; taking [i.e. theft of] drugs, use of a shot gun. I am wondering if you and the Commonwealth have had any discussion regarding a plea [of guilty]. I strongly suggest that you ask your client to consider a plea, because, if the jury returns a verdict of guilty, I might be disposed to impose a substantial prison sentence. You know that I am capable of doing that because you know of the sentences in a previous trial."

The judge had not been asked by defense counsel for his views, nor were they interjected into any plea bargaining conference between defense counsel and the prosecutor. Rather, they came out of the air, and ended with a recitation of the judge's power and disposition that could well be read as "plea or else." Whatever his actual state of mind, or purpose, we ragard the judge's mid-trial interjections as susceptible of appearing from the defendant's perspective to be an attempt to

coerce him to plead. Defendant refused and stood trial.[2/]

After conviction, the judge sentenced defendant to thirty-two to forty years in the state penitentiary on the armed robbery charges, and concurrent terms of eight to ten years on the counts for gun carrying and assault, to be served from and after the sentence for armed robbery. Thus, defendant was sentenced to a total of forty to fifty years. The assault sentence exceeded the statutory maximum, and both of

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2/ The Commonwealth argues that the fact that the defendant continued with the trial and took the stand shows that there was no coercion. This is beside the point; it does not negate the appearance of an attempt, nor dispel the possibility of a retaliatory sentence. The fact is, although we do not rest our decision on it, that defendant, on the stand, may well have felt coerced, as he freely admitted his participation in the robbery. His unfavorable testimony was that his co-defendant was not involved, a contention the jury ultimately agreed with.

these lesser charges were basically, in terms of conduct, included in the armed robbery count, as the Massachusetts Appellate Division essentially recognized. On appeal it reduced the principal sentence to thirty to forty years, the assault to five, and ordered all setences to be served concurrently. This effectively cut ten years off the defendant's sentence, but since the court was without knowledge of the judge's remarks to counsel that are the basis of the present proceeding, we cannot regard this as rectification. In the absence of indication to the contrary, we assume that the Appellate Division includes in its consideration the sentences originally imposed.

Defendant complains of the disparity between the three-year sentence in the house of correction given his co-defendant who pleaded guilty and the lengthy prison

sentence given him. The Massachusetts court justified this on the basis of a comparison of their prior records. We do not pursue this, except to note that the trial court voiced no explanation, in contrast to the practice often found appropriate because of the circumstances. See, e.g., North Carolina v. Pearce, 395 U.S. 711, 726 (1969) (quoted in United States v. Goodwin, 102 S.Ct. at 2489); United States v. Miller, 589 F.2d 1117, 1137-39 (1st Cir. 1978), cert. denied, 440 U.S. 958 (1979) (per curiam). What we do say is that the on-the-surface differential, and the total sentence imposed, are too great to allay a reasonble apprehension that the sentencing judge's original remarks were unjudicial urgings to plead, and that the sentences were a retaliatory consequence of the defendant's refusal.

The apparent judicial coercion is more serious than alleged prosecutorial coercion involved in Goodwin, we dealt with generally in our earlier opinion, and need not repeat in full. The distinction particularly important in the present case, however, is this. By hypothesis, the prosecutor and the defendant are adversaries and are expected to be at odds with one another. As pointed out in Goodwin, in the give and take of pretrial proceedings it is all too easy to call any particular undertaking a threat, even when it is not. A judge, however, is expected to be impartial, and to appear impartial. It is difficult to reconcile with impartiality a forceful recommendation to consider pleading, ending on a note of the judge's power to impose a substantial sentence if not complied with.

We would distinguish this case from one in which a judge merely inquired of counsel whether he had considered plea bargaining. This language was far different. We would add, if respondent wishes to speak in terms of plea bargaining participation, that the judge in effect participated in plea bargaining in advance. If plea bargaining had ensued, his volunteered attitude would clearly seem to have strengthened the prosecutor's hand. Advice to plea bargain "or else," would not gladden the heart of bargaining defense counsel.

A rule which required a defendant to make a prima facie case of actual vindictiveness on the part of a judge, which the Massachusetts court seemingly adopted, Commonwealth v. Longval, 390 N.E.2d 1117, 1120 (1979), even if counsel were willing to suffer the reputation with the bench that this would be likely to give

him, would impose an almost impossible burden. We believe the present case, and our decision, fall squarely within the Court's reasoning in Goodwin, rather than without it. The writ of habeas corpus shall issue unless within sixty days the defendant is resentenced before a Massachusetts Superior Court Justice other than the one who presided at his trial.

United States Court of Appeals
For the First Circuit

No. 80-1503

NORMAN L. LONGVAL,

PETITIONER-APPELLANT,

v.

LAWRENCE R. MEACHUM, Et Al.,

RESPONDENTS-APPELLEES.

APPEAL FROM THE UNITED STATED DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[HON. WALTER JAY SKINNER, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
ALDRICH and BOWNES, *Circuit Judges*.

Corey M. Belobrow, Boston University Law Student, with whom *John Leubsdorf*, Associate Professor of Law, Court appointed counsel, *Jeffrey Lesser*, *Christine Schwab*, and *James R. Wacht*, Boston University Law Students, were on brief, for appellant.

Annette C. Benedetto, Assistant Attorney General, with whom *Francis X. Bellotti*, Attorney General, and *Barbara A.H. Smith*, Assistant Attorney General, Chief, Criminal Appellate Division, were on brief, for appellees.

June 19, 1981

BOWNES, *Circuit Judge*. Appellant Norman Longval appeals from a judgment of dismissal entered by the United States District Court for the District of Massachusetts denying his petition for habeas corpus. The petition challenged Longval's original forty to fifty-year prison sentence as an unconstitutional punishment for his exercise of the right to trial. We reverse and remand for resentencing de novo.

Longval was indicted jointly with Richard T. Ellard and Kenneth M. Golden on two charges of armed robbery of a pharmacy, assault by means of a dangerous weapon, unlawfully carrying a sawed-off shotgun, and using a motor vehicle without authority. Ellard pled guilty to all indictments[1] and was given sentences totalling three years in the Billerica House of Corrections — two years on the assualt with a dangerous weapon charge and one year on the motor vehicle charge — and a consecutive term of three years' probation. Longval and Golden pled not guilty; the jury trial was conducted by the same judge who sentenced Ellard. Longval was convicted on all indictments and sentenced to concurrent terms of 32 to 40 years on the two armed robbery charges, and concurrent terms of eight to ten years on the assault and gun carrying charges, to be served from and after the sentences for armed robbery. The eight to ten-year sentence for assault with a dangerous weapon was in excess of the five-year statutory maximum. Mass. Gen. Laws Ann. ch. 265, § 15B. Golden was acquitted on all indictments.

On sentence appeal, the Appellate Division reduced Longval's sentence as follows: concurrent terms of 30 to 40 years on the armed robbery indictments and lesser terms as to the other sentences,[2] all to be served concurrently with the sentence for armed robbery.

Longval then appealed pursuant to Mass. Gen. Laws Ann. ch. 278, §§ 33A-G claiming that the court abused its discretion in sentencing, that the sentences were unlawfully disparate when compared with Ellard's terms, and, further, that the trial judge unconstitutionally punished him for exercising his right to trial. He subsequently filed a petition for a writ of

[1] The Massachusetts Supreme Judicial Court uses the term "indictments" to describe what would be called "counts" in federal parlance.

[2] The other reduced sentences were four to five years on the assault with a dangerous weapon charge, and eight to ten years on the charge of carrying a dangerous weapon.

error in the Supreme Judicial Court attacking his sentences. Because the petition referred to matters outside the record, the Single Justice, handling the matter, ordered the record on appeal expanded to include the transcript of Ellard's plea and sentencing. A special master was appointed to report on the substance of an unrecorded lobby conference between the court, counsel for defendant, and the assistant district attorney. The master held a hearing at which he received testimony from all but the trial judge.[3] Because defense counsel and the government prosecutor agreed that the trial transcript made no reference to the lobby conference in question, the master made his findings without reading the transcript. The master found that, before Longval had an opportunity to present his evidence, there was a lobby conference at which the judge stated in essence to defense counsel:[4]

> Mr. Primason, the evidence in this case as it is coming in is very serious, — robbery of a drug store, taking [i.e. theft of] drugs, use of a shot gun. I am wondering if you and the Commonwealth have had any discussion regarding a plea [of guilty]. I strongly suggest that you ask your client to consider a plea, because, if the jury returns a verdict of guilty, I might be disposed to impose a substantial prison sentence. You know that I am capable of doing that because you know of the sentences in a previous trial.

The Supreme Judicial Court affirmed the judgments of conviction, *Commonwealth* v. *Longval*, 390 N.E.2d 1117 (1980), and rejected appellant's claim that he was punished for exer-

[3] Both counsel were afforded the opportunity to call the judge as a witness, but chose not to do so; they did consult with him by telephone and he stated that, although one might have taken place, he could not recall any lobby conference.

[4] The government attorney could not remember the lobby conference and the special master's findings were, therefore, based largely on the testimony of Longval's defense counsel.

cising his right to trial. The court recognized the constitutional principle that a defendant is entitled to exercise his right to trial free from the threat of punishment, but did not "read the words of the judge ... as supporting an inference of ... punishment or threat of punishment," *id.* at 1120, and concluded that his statements were not "inappropriate." *Id.* It held that the widely disparate sentences as between Ellard and Longval were justified by their widely di parate criminal records.

Appellant next filed a petition for a writ of habeas corpus in the district court, charging that his due process rights had been violated because he was penalized for exercising his right to trial by jury. The court dismissed the petition without opinion and subsequently declined to certify probable cause, stating that the application and appeal were "frivolous." This court granted a certificate of probable cause on August 3, 1980. Before us, Longval presses the arguments that the trial court of the Commonwealth violated his constitutional rights by imposing a substantial prison sentence because he chose to plead not guilty and proceed to trial, that the Appellate Division's reduction of his sentence to 30-40 years does not expunge beyond a reasonable doubt the taint of unconstitutionality, and that the violation and its effects will not be removed unless he is sentenced de novo by a different judge.

With respect to appellant's first argument, we begin with the premise that those who choose to exercise the rights which our judicial system confers must be able to do so without fear of penalty. "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978). Thus, the Supreme Court has protected defendants who exercise their right to appeal from possible vindictiveness on the part of the trial judge, *see North Carolina* v. *Pearce*, 395 U.S. 711 (1969), or the prosecutor, *see Blackledge* v. *Perry*, 417 U.S. 21 (1974). This court has held that the accused

"should not have to fear even the possibility," *Marano* v. *United States*, 374 F.2d 583, 585 (1st Cir. 1967), that he will suffer a penalty for exercising his rights. *See Lovett* v. *Butterworth*, 610 F.2d 1002, 1005 (1st Cir. 1979), *cert. denied*, 100 S. Ct. 3038 (1980). The court in *Pearce* held that "due process ... requires that a defendant be freed of the apprehension of such retaliatory motivation on the part of the sentencing judge." 395 U.S. at 725. In *Lovett*, we quoted approvingly the view that:

> "In effect, *Blackledge* sets up a per se rule ... that in some situations a due process violation can be established by a showing that defendants might have a reasonable apprehension of prosecutorial vindictiveness, without a showing that the prosecutor actually had a vindictive or retaliatory motive to deter appeals." *Jackson* v. *Walker*, 585 F.2d at 143. "The semblance of vindictiveness that arises from the imposition of a harsher sentence the second time around must be obviated so that the proceedings do not leave the impression of unfairness to the defendant ... and so that other defendants are not deterred from exercising rights of appeal due to apprehension of vindictiveness." *United States* v. *Tucker*, 581 F.2d 602 (7th Cir. 1978). Otherwise the situation is too suggestive of the possibility of vindictive motive. "Due process of law requires that such a potential for vindictiveness not enter into [Massachusetts'] two-tiered appellate process." *Blackledge* v. *Perry*, 417 U.S. at 28, 94 S.Ct. at 2103.

610 F.2d at 1007 (footnote omitted).

The rationale of *Pearce-Blackledge* is applicable to the case at hand. Our review leads us to conclude that the judge's remarks could reasonably have had a chilling effect on the exercise of the defendant's right to trial by jury. The court clearly implied to counsel that it might mete out a substantial prison sentence if Longval did not plead guilty; it pointedly referred to sentences imposed in a previous trial as examples of its cap-

acity to do so. It matters not whether the trial judge actually meant to issue such a threat; whether his remarks could create a "reasonable apprehension of vindictiveness" is the issue. *Cf. Lovett* v. *Butterworth*, 610 F.2d at 1007. With all due respect and deference to the special master and the Supreme Judicial Court of Massachusetts, we believe the words of the judge could well have been understood by defense counsel as a "plea or else" admonition.

In reaching this view, we recognize once more that "it is unfair to use the great power given to the court to determine sentence to place a defendant in the dilemma of making an unfree choice." *Worcester* v. *Commissioner of Internal Revenue*, 370 F.2d 713, 718 (1st Cir. 1966). The words of an outstanding federal trial judge bear repeating:

> The unequal positions of the judge and the accused, one with the power to commit to prison and the other deeply concerned to avoid prison, at once raise a question of fundamental fairness. When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office. His awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not. A defendant needs no reminder that if he rejects the proposal, stands upon his right to trial and is convicted, he faces a significantly longer sentence. One facing a prison term, whether of longer of shorter duration, is easily influenced to accept what appears the more preferable choice. Intentionally or otherwise, and no matter how well motivated the judge may be, the accused is subjected to a subtle but powerful influence.

United States ex rel. Elksnis v. *Gilligan*, 256 F. Supp. 244, 254 (S.D.N.Y. 1966) (footnote omitted). We readily accept the master's finding that the trial judge in this case acted with the best of intentions; but we think it clear that, viewed from the crucial perspective of the defendant, the judge's statements

could reasonbly have been understood as a threat.

A judge who participates in plea bargaining "is no longer a judicial officer or a neutral arbiter. Rather, he becomes or seems to become an advocate for the resolution he has suggested to the defendant." *United States* v. *Werker*, 535 F.2d 198, 203 (2d Cir.), *cert. denied*, 429 U.S. 926 (1976).

Under the circumstances, this case must be remanded for resentencing. That the Appellate Division reduced the sentences does not remove the unconstitutional taint. In reaching its decision, it did not address the constitutional issues and did not have the report of the special master. Thus its consideration of appellant's sentence was necessarily limited to the disparity of sentences alone, and could not serve to remove the taint given that disparity by the trial judge's remarks. There are no absolutes as to whether a remand should be to the original judge or to another, *O'Shea* v. *United States*, 491 F.2d 774, 778 (1st Cir. 1974). The nature of the particular situation may vary from case to case. Generally, however, it "is difficult for a judge, having once made up his mind, to resentence a defendant." *Mawson* v. *United States*, 463 F.2d 29, 31 (1st Cir. 1972). Where, as in the case at hand, there exists the possible appearance of vindictiveness, then the case should be remanded for resentencing by a different judge. This fosters the appearance of justice, even though the sentencing judge may be able to act impartially.

The writ of habeas corpus shall issue unless within sixty days the defendant is resentenced before a Massachusetts Superior Court Justice, other than the one who presided at his trial.

/ dm. Office, U.S. Courts — Blanchard Press, Inc., Boston, Mass.

APPENDIX "C"

COMMONWEALTH vs. NORMAN L. LONGVAL.

Essex. March 6, 1979. - June 12, 1979.

Present: Hennessey, C.J., Quirico, Kaplan, Wilkins, & Abrams, JJ.

Practice, Criminal, Sentence.

Indictments found and returned in the Superior Court on September 9, 1975.

The cases were tried before Donahue, J.

The Supreme Judicial Court granted a request for direct appellate review.

Beth H. Saltzman for the defendant.
Patrick J. Riley, Assistant District Attorney, for the Commonwealth.

HENNESSEY, C.J. The single issue presented by the defendant is whether State prison sentences imposed on him totaling forty to fifty years, and later reduced by the Appellate Division of the Superior Court to thirty to forty years, were

grossly and unlawfully disparate from a codefendant's sentences to three years in a house of correction and an additional term of probation.

Norman L. Longval, Richart T. Ellard, and Kenneth M. Golden were indicted jointly on two charges of armed robbery, assault by means of a dangerous weapon, unlawfully carrying a sawed-off shotgun, and using a motor vehicle without authority. All of the defendants appeared before a judge of the Superior Court on November 6, 1975.

Ellard pled guilty to all indictments and was sentenced as follows: two years in a house of correction on the assault by means of a dangerous weapon charge; one year in a house of correction on the motor vehicle charge, to be served from and after

the first sentence imposed; and three years probation on the armed robbery charge, to run from and after the second sentence imposed. The other indictments were filed.

Longval and Golden had a trial by jury from November 6 until November 10, 1975, before the same judge who sentenced Ellard. Longval was convicted on all indictments and was sentenced as follows: concurrent terms of thirty-two years to forty years at Massachusetts Correctional Institution, Walpole, on the armed robbery charges, and concurrent terms of eight to ten years on the assault and gun carrying charges, to run from and after the sentences for armed robbery. The motor vehicle charge was filed. Golden was acquitted on all indictments.

As a result of a sentence appeal, Longval's sentences were reduced by the Appellate Division as follows: concurrent terms of thirty to forty years on the armed robbery indictments, and lesser terms as to the other sentences, all to be served concurrently with the sentences for armed robbery.

On his appeal pursuant to G. L. c. 278, SS 33-A-33G, Longval assigned one error dealing with the disparity between his sentences and those given Ellard. Subsequently, Longval filed a petition for a writ of error in this court attacking his sentences and referring to matters outside the record on appeal. A single justice of this court declined to issue the writ, but instead ordered the record on appeal to be

expanded to include the transcript of Ellard's plea and sentencing and, by report of a special master, to include the substance of an unrecorded lobby conference between the sentencing judge and the counsel in the case. After a hearing, the special master found that in an unrecorded conference during the presentation of the Commonwealth's case, the judge said to Longval's counsel: "[T]he evidence in this case as it is coming in is very serious - robbery of a drug store, taking [i.e. theft of] drugs, use of a shot gun. I am wondering if you and the Commonwealth have had any discussion regarding a plea [of guilty]. I strongly suggest that you ask your client to consider a plea, because, if the jury returns a verdict of guilty, I

might be disposed to impose a substantial prison sentence. You know that I am capable of doing that because you know of the sentences in a previous trial." The master found that the judge was referring to "very substantial sentences" imposed that month on three codefendants after jury verdicts of guilty.

At the hearing during which Ellard pleaded guilty, the prosecutor read a police report of the incident, which contained a statement given by one Arthur M. Kelley. According to that statement, Kelley and one Michael Coraine were working in a drugstore in Swampscott when a man came behind the prescription counter "jabbing" a shortbarreled gun at them and saying, "I want narcotics, the morphine,

all the Class A's." As Kelley filled bags with narcotics from the medicine cabinet, the man told Coraine to lie down and took a five-dollar bill from Coraine's wallet. Another man, Ellard, came up with a knife and told the first man to hurry up. The first man directed Coraine to open the cash register and told Kelley to lie still on the floor, saying, "If you move, I'll blow your brains out." Before leaving in a Chevrolet automobile, the men further threatened them, saying, "Don't move or we'll blow your brains out. Stay put for five minutes."

The police report further indicated that in response to a radio report, officers in a police vehicle chased the Chevrolet. A person on the passenger's side shot at them but missed.

During examination by the judge, Ellard said that he had suffered blackouts from drinking and had an alcohol problem but was not presently addicted to alcohol. Although admitting involvement in the crimes, he said he was drunk at the time, did not use the shotgun, and did not threaten anyone with the kife he carried.

After accepting Ellard's pleas, the judge heard the prosecutor's recommendation: a three- to five-year State prison sentence on the two armed robbery indictments to be served at a house of correction. Observing to defense counsel that "we had an informal conference on this matter this morning," the judge said, "I have gone through the probation record, and I'm aware that this defendant

has not been in any real serious trouble prior to this event of June of this year. And I think his problem is primarily alcohol." Defense counsel added "[F]or the last eleven years he has had a problem, and as a result has lost jobs, his family, his wife," and asked that the assistant district attorney's recommendation be adopted. The judge, in imposing sentences totaling three years in the Billerica House of Correction and a consecutive term of three years' probation, noted that alcohol treatment was available at Billerica. He also imposed as a special term of probation that Ellard "seek and sustain alcoholic treatment."

At Longval and Golden's trial, the Commonwealth called seven witnesses.

Kelley and Coraine testified in a manner generally consistent with Kelley's statement to the police. They identified Longval as the man who carried the shotgun while in the pharmacy. Neither witness could identify Golden or say whether he was in the getaway car.

Police witnesses identified Longval as the driver of the green Chevrolet they chased and Golden as the front seat passenger who shot at them while the car was taking a curve at a high speed, about 150 feet in front of their cruiser. They described the arrests of Longval and Golden at separate locations in Marblehead, Golden denied participation in the crimes and said he had been jogging.

After the Commonwealth rested, Longval testified. Longval stated that he went to the Bickford Pharmacy with Ellard in a car he previously had stolen, and that no third person accompanied them. Inside the pharmacy, Longval carried the gun, which he had obtained from a friend of Ellard. He further testified that during the chase, he drove and Ellard used the gun to shoot at the police; that Golden was not present and did not participate in the crimes; and that he first saw him that day at the Swampscott police station. Golden did not testify.

After the jury convicted him on all indictments, Longval was sentenced. The prosecutor recommended a State prison sentence of thirty-two to forty years for armed robbery and a consecutive eight- to

ten-year sentence for assault by means of a dangerous weapon. He made no recommendation on the remaining indictments.

Defense counsel advised the judge that Longval was thirty-six years old. Stating that his client had testified "in an effort to see to it that justice was done in a case of a fellow he felt was wrongfully accused," counsel suggested that "the Court should take into consideration that factor in his favor." Counsel acknowledged that Longval was no stranger to the courts, had a previous record for larcenies, and had served a five- to eight-year sentence at the Correctional Institution at Walpole for armed robbery. However he pointed out that the record reflected an involvement with narcotics as early as 1960 and, except for

the armed robbery conviction, a "rather obvious lack of violence."[1/]

Defense counsel suggested that the crimes were serious, but that a sentence of fifteen to thirty years would be adequate punishment. He made no mention of the sentences given Ellard.

Essentially adopting the prosecutor's recommendation, the judge sentenced Longval to State prison terms totaling forty to fifty years. He gave no reasons for the sentences imposed. Subsequently, after a hearing, the Appellate Division of the Superior Court reduced Longval's sentences. The revised sentences totaled

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1/However, the judge had learned that Longval had recently escaped from the Salem House of Correction and that a firearm had been involved.

thirty to forty years at Walpole.[2/]

We turn first to the defendant's assertions based on constitutional considerations. The defendant, we think correctly, does not rely on the constitutional prohibitions against cruel and unusual punishment, as contained in the Eighth Amendment to the United States Constitution and art. 26 of the Massachusetts Declaration of Rights. See Commonwealth v. O'Neal, 369 Mass. 242, 246-250 (1975) (Tauro, C.J., concurring), and cases cited. These constitutional principles do not reach this case. The applicable statute, G. L. c. 265, § 17,

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2/In so doing the Appellate Division corrected one of the lesser sentences which exceeded the statutory limit but which was a concurrent sentence and did not affect the total time to be served.

establishes the extreme seriousness of the crime of armed robbery, in its provision that sentence may be imposed of any term of years up to life imprisonment.

Rather, the defendant argues that to the extent a trial judge punishes a defendant for having a trial by jury, he commits constitutional error, citing United States v. Stockwell, 472 F.2d 1186, 1187 (9th Cir.), cert. denied, 411 U.S. 948 (1973), or at least abuses his discretion, citing United States v. Wiley, 278 F.2d 500, 503 (7th Cir. 1960). We agree with the defendant's premise. However, it is not applicable here, on the facts of this case. We do not read the words of the judge, quoted supra, as supporting an inference of such punishment or threat of

punishment. His words directed the attention of defense counsel to sentences he had imposed in other unrelated cases; they commented on the serious nature of the offense as shown in the evidence at the trial; and they advised the defendant through his counsel, not to forgo any advantage that might accrue to the defendant by means of plea bargaining and a resulting recommendation to the court by the prosecutor, as to the sentence.

There was nothing inappropriate in thse comments by the judge. To read into the words the meaning now urged by the defendant is to strain their plain language. Even if we were to accept the premise that there is ambiguity in the phrasing, we would decline to reach as far

as the defendant does to force an inference of an unlawful meaning in the words.

Beyond the constitutional arguments, the defendant urges that this court should correct "legal error" in the sentence imposed. It is true that error of law which occurs in sentencing is an appropriate matter for appellate relief. See Commonwealth v. Sitko, 372 Mass. 305, - (1977);[a/] Commonwealth v. LeBlanc, 370 Mass. 217, 222-225 (1976); Commonwealth v. Franks, 369 Mass. 608, 609 (1976). Yet, in this case there was no error of law; the sentences imposed were within the broad discretion afforded to the judge in the statutes. However, the defendant argues that there is such great disparity

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a/Mass. Adv. Sh. (1977) 668, 676-678.

between the punishment of Ellard and the defendant as to require a remedy.

The defendant concedes that his premise is unprecedented in this jurisdiction. The Appellate Division of the Superior Court is the appropriate forum for relief against unfair disparity, and in this case the Appellate Division has already afforded a large measure of relief in reducing the sentence by ten years. However, the defendant argues that special principles apply to the sentencing of coparticipants in the same crime, and that equal participants should be given comparable sentences, at least where they have similar backgrounds, citing United States v. Williams, 499 F.2d 52, 56 (1st Cir. 1974),

and Burleson v. State, 543 P.2d 1195, 1201 (Alaska 1975).

We agree that this court should review sentences for errors of law or constitutional violation, but we do not accept the premise that we ordinarily have jurisdiction to review for alleged disparity. We do not say that there may never be a case in which the sentence is so severe or the demonstrated disparity so great as to amount to an abuse of discretion and, thus, present an appropriate subject for our review. See G. L. c. 211, § 3. We add that, even were we to reach the merits of this case, and consider what is urged here to be wide disparity of punishment between coparticipants, we can see ample

justification for the sentences imposed. In addition to the nature of the offense, a wide variety of factors can be taken into account, such as the defendant's character, background and prior record. Commonwealth v. Celeste, 358 Mass. 307, 310 (1970). Letters v. Commonwealth, 346 Mass. 403, 405 (1963). While the defendant concedes that he appartnely conceived and led the robbery, and carried the more dangerous weapon inside the pharmacy, he argues that there was similarity between the two men in age, background, and participation in the robbery.

The Superior Court judge, and subsequently the Appellate Division, were justified in concluding that widely disparate sentences, as between Ellard and

the defendant, were warranted by their widely disparate criminal records. By consent of the parties, we have examined the prior records of both men. Ellard's record may fairly be said to include a number of prior offenses, but all of minor or trivial nature, with none involving violence or the likelihood of violence until he was involved in the instant armed robbery. The defendant, on the other hand, has a record of almost twenty years of repeated, serious offenses, most involving stealing in some form, and some involving breaking and entering. He has served prison terms on a number of occasions. Perhaps overriding importance is the fact that the defendant served a prior five- to eight-year sentence for armed robbery. In all, the judge could conclude, and

obviously did, that the defendant was a confirmed and dangerous offender.[3]

Judgments affirmed.

3/We do not consider the arguments that another judge might not have sentenced the defendant so severely, or that the judge should have made written findings as to the sentence imposed, especially since a coparticipant was sentenced. These questions concern the greater issue as to whether the sentencing discretion of judges should be limited, and this is a matter now under legislative consideration.

APPENDIX "D"

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPREME JUDICIAL COURT
FULL COURT NO. 1635

COMMONWEALTH OF MASSACHUSETTS

vs.

NORMAN L. LONGVAL

REPORT OF SPECIAL MASTER
AND COMMISSIONER

Background Findings

1. On this appeal from conviction of Longval on various indictments (R. 2-8), certain expansions of the record were made in the Appeals Court in the manner described on page 3 of Longval's "Memorandum in Support of Application for Direct Appellate Review". A copy of that page 3 is annexed marked Annex 1. By order

of the Full Court dated November 21, 1978 (copy annexed marked Annex 2), the matter of expanding the record in respect of the lobby conference, asserted to have taken place in the footnote on page 3 of Annex 1, was referred to me to report the facts as found by me concerning the existence of such a conference and the events and discussion, if any, there taking place.

2. After a pretrial conference, I held a hearing on November 28, 1978, at which testimony was offered by present counsel for Longval and by an Assistant District Attorney from Essex County. The testimony was somewhat conflicting.

Trial counsel for Longval (Mr. Primason) testified to facts upon which I largely base the findings made by me below

in paragraphs 3 to 7. The former Assistant District Attorney who tried the cases for the Commonwealth (Mr. Kelleher) remembers no bench or lobby conference during the trial of these cases in which any discussion of plea bargaining went on. Both present counsel agreed before me (1) that the trial transcript shows no such conference and (2) that there was no occasion for my reading any part of the trial transcript.

Findings Concerning Alleged Conference

3. The criminal cases against Longval were tried at Lawrence before Judge Donahue from November 6 until November 10, 1975. R. 1. The defendant was represented by Mr. Webb Primason, then a young attorney

with the Massachusetts Defenders Committee, with his office in Salem. It was his first representation of a criminal defendant before a jury. The Commonwealth was represented by Mr. Richard Kelleher, an Assistant District Attorney. Each of them testified before me. Each of them appeared to me to be testifying honestly and truthfully. Mr. Kelleher had no memory of any 1975 conference in the Judges' lobby or elsewhere in which plea negotiations were mentioned. He conceded that there might have been such a conference but has no memory of one. Mr. Primason remembers such a conference in the Judges' lobby at which Judge Donahue, Mr. Primason, and Mr. Kelleher were present but at which no clerk or court stenographer was present. It was

the first time Mr. Primason had been in Judge Donahue's lobby and (as noted above) the first jury criminal case he had tried.

4. Mr. Primason does not remember the occasion for the lobby conference, but now thinks that it was called by some party or the judge for a discussion of some matter other than plea negotiations. His recollection is that the lobby conference took place during the presentation of the Commonwealth's case, but before the Commonwealth had rested, and that other witnesses were called by the Commonwealth after the conference. Mr. Primason, however, conceded that as to (a) the occasion for, and (b) the time in the trial of, the conference his memory is not

precise and that his memory may be faulty. I regard these matters mentioned above in this paragraph as unimportant and largely immaterial. I personally pressed him, after somewhat general testimony, to be as precise as possible concerning what Judge Donahue said, and he replied (and I find his statement to represent the facts) that Judge Donahue said in substance the following (not purporting however, to quote the Judge with much precision,) - Mr. Primason, the evidence in this case as it is coming in is very serious, - robbery of a drug store, taking [i.e. theft of] drugs, use of a shot gun. I am wondering if you and the Commonwealth have had any discussion regarding a plea [of guilty]. I strongly suggest that you ask your client

to consider a plea, because, if the jury returns a verdict of guilty, I might be disposed to impose a substantial prison sentence. You know that I am capable of doing that because you know of the sentences in a previous trial. See par. 5, below. [I took careful and almost verbatim notes of this answer and read my notes back to Mr. Primason. He said that this statement is accurate to the best of his memory.]

5. The reference to a previous trial was to a sentence imposed by Judge Donahue in criminal cases (against defendants named Hogan, Aterone, and LaRocque) tried in Lawrence late in October, 1975, or early November, 1975. These cases involved kidnapping of a woman (wife of the debtor

mentioned later and mayhem against that debtor (who owed money to a codefendant) to coerce payment of the debt. Judge Donahue had imposed very substantial sentences after jury verdicts of guilty. Nothing in the context of the conference as described to me in testimony led me to construe the Judge's remarks as in any sense a threat but merely as a statement to a young lawyer of the Judge's then general impression of the evidence as it had developed to that point. There was (as Mr. Primason testified) no reference by the Judge at the conference to a sentence of "fifteen to twenty years". No specific term was mentioned during the conference.

6. There had been, before trial, a plea bargaining conference between the

Assistant District Attorney, Mr. Kelleher, and a Mr. Chouinard, counsel for one Golden, a codefendant. Mr. Primason had been present at that conference solely for the purpose of keeping informed. He had not participated in any plea bargaining because he had not been authorized to do so by his client, Longval. At that conference, Mr. Chouinard had asked if the Assistant District Attorney would recommend fifteen to twenty years in the event of a plea of guilty by Golden. Mr. Kelleher had consulted a senior assistant and the Swampscott prosecutor, a lieutenant Cassidy, who felt the case against Golden was "air tight". No recommendation was made.

7. Mr. Primason reported to his client Longval the discussion at (a) the

lobby conference and (b) the pretrial plea bargaining conference. The petition for a writ of error, Supreme Judicial Court, Suffolk No. 78-155 CIV, and the footnote on page 3 of Longval's "Memorandum in Support of Application for Direct Appellate Review." (see Annex 1), were prepared, in good faith, by Longval's present counsel (Miss Susan J. Baronoff of the Massachusetts Defenders Committee) on the basis of information furnished to her by Longval. I find and conclude that those documents (especially paragraph 6 of the petition for a writ of error) do not accurately state what went on at the lobby conference and that information about that conference was inaccurately conveyed to Miss Baronoff. The footnote to Annex 1

greatly overstates and misstates the Judge's remarks at the lobby conference, as disclosed in testimony before me.[1/]

8. At the close of the testimony before me, I afforded counsel opportunity to consult Judge Donahue to see whether they, or either of them, wished to call him as a witness before me. They did consult the Judge and decided not to call him as a witness. He, by telephone, had expressed willingness to appear and testify before me if called. He said he could not recall any lobby conference at this late date although one might have taken place. In view of

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1/I make no finding on the cause of the misinformation furnished to Miss Baronoff or how it occurred. See p. 2 of her objections and suggestions attached as Annex 3.

counsel's position, I saw no occasion for inquiry of the Judge.

9. I find and conclude that the facts concerning the conference are as stated in the foregoing report.

10. I attach as Annex 3, the objections and suggestions to my draft report filed by Miss Baronoff. I have added footnote 1, page 6, supra, to meet her second objection.

As to her objection to the next to last sentence of par. 5, page 5, supra, any conclusion in that sentence reflects my reaction to all Mr. Primason's testimony. The specific statement of what Judge Donahue said at the lobby conference appears in par. 4, page 4, above.

11. A copy of a draft report (in all substantial respects as it appears above,

except for pars. 10 and 11, footnote 1, page 6, and annex 3) was sent to counsel on December 1. Each attorney has notified me that he or she does not desire to be heard further before me.

Respectfully Submitted,

Special Master and
Commissioner

December 7, 1978

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No. 82-1157

In the Supreme Court of the United States

October Term, 1982

LAWRENCE R. MEACHUM, et al.,

Petitioners,

v.

NORMAN L. LONGVAL,

Respondent

On Petition for Certiorari to the United States Court of Appeals for the First Circuit

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RESPONDENT'S OPPOSITION TO PETITION FOR CERTIORARI

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No. 82-1157

In the Supreme Court of the United States

October Term, 1982

LAWRENCE R. MEACHUM, et al.,

Petitioners

v.

NORMAN L. LONGVAL,

Respondent

Respondent's Opposition to Petition for Certiorari

Respondent Norman Longval urges that certiorari not be granted, for the following reasons.

Statement of the Case: Omitted Facts

The Statement in the Petition does not state the Court of Appeals' grounds for holding Respondent Longval's sentence unconstitutional. That court (composed of Chief Judge Coffin and Judges Aldrich and Bownes) relied on the principle that "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." Pet. App. B., p. 4, quoting Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978). The Court of Appeals, in brief, held that Longval received an unusually long prison term because he rejected the trial judge's call that he surrender his right to be tried before being sentenced. It noted that during his trial, before Longval had an opportunity to present evidence, "The court clearly implied to counsel that it might mete out a substantial prison sentence if Longval did not plead guilty; it pointedly referred to sentences imposed in a previous trial as examples of its capacity to do so." Pet. App. B, pp. 3, 5-6.* Longval did not plead guilty but admitted his guilt on the stand and was convicted (Pet. App. C, p. 11).

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* The trial judge's words, as found by the state court, may be found at Pet. App. D, pp. 6-7, in the Petition at pages 6-7, and at page 5 of this Opposition. Longval's counsel reported the judge's words to Longval. Pet. App. D, pp. 9-10.

The judge, who had "strongly suggest[ed]" a plea (Pet. App. D, p. 6) then gave Longval sentences amounting to forty to fifty years in Walpole State Prison (Pet. App. C, p. 3). On these facts, the Court of Appeals accepted the state court's findings that the trial judge spoke without improper intent, but held that his words nevertheless created "a reasonable apprehension of vindictiveness" which unconstitutionally tainted the sentence, and required resentencing (Pet. App. B, pp. 6-7).

The Court of Appeals further explained its reasoning after this Court remanded for reconsideration in light of United States v. Goodwin, 102 S.Ct. 2495 (1982). It stated that:

> We fully accept the Court's guidance in Goodwin that recovery on the basis of a reasonable apprehension of vindictiveness also requires that the situation be one in which, in general, there is a "reasonable likelihood of vindictiveness," and we reaffirm our conclusion that this was such a situation.

The Court clarified the limits of its holding by noting that "The judge had not been asked by defense counsel for his views, nor were they interjected into any plea bargaining conference" (Pet. App. A, p. 5)* and distinguished "this case from one in which a judge merely inquired of counsel whether he had considered plea bargaining." (Pet. App. A, p. 10). The Court of Appeals emphasized that the trial judge's forty to fifty year sentence had exceeded the statutory maximum,** that Longval's codefendant who pleaded guilty received a prison sentence of only three years (followed by three years probation), that the trial judge gave no explanation for his sentence, and that the judge imposed consecutive sentences for charges basically included in the same offense (Pet. App. A, pp. 6-8). (All the charges arouse out of the same pharmacy robbery, during which no one was injured. Pet. App. C, pp. 6-7, 10-11). The Court of Appeals noted that the Commonwealth, in its

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* There was no plea bargaining involving Longval at any time (Pet. App. A, p. 3; App. D, p. 9).

** The Massachusetts Appellate Division later reduced Longval's sentence to thirty to forty years; the Petition does not contest the Court of Appeals' conclusion that this does not wipe out any original violation (Pet. App. B, pp. 2, 7).

previous petition for certiorari which led to the remand, had "seized upon" a "collateral remark" in the Court of Appeals' previous opinion, presenting to this Court an issue not really present in the case (Pet. App. A, pp. 2-3).

Summary of Argument

The Court of Appeals fully accepted the state courts' assertion that the trial judge's comments urging Longval to plead guilty or face a "substantial prison sentence" were not a "threat." The Court was thus in full accord with Sumner v. Mata, 449 U.S. 539 (1981). The Court's construction of the state courts' statement that there was no "threat" as meaning that the judge had no improper intent was also warranted. Even were it not, the only alternative reading would be that the judge's comments were not unconstitutionally coercive, which is a conclusion of law to which the Court of Appeals owed no deference. In any event, this Court should not grant certiorari just to consider whether the Court of Appeals correctly construed the state court opinions, particularly since the Petitioners failed to include that issue among the questions presented the last time they sought certiorari.

The issue which this Court remanded to the Court of Appeals for reconsideration--the applicability of United States v. Goodwin, 102 S.Ct. 2485 (1982) to this case--was correctly resolved below. That Court applied to the unusual facts of this case the rule recognized by Goodwin: that a defendant can establish a presumption that he was punished for asserting his rights by proving a "reasonable likelihood of vindictiveness" even though he cannot prove that the judge or prosecutor in question acted with actual vindictive intent. Here, the judge's uninvited assertion that failure to plead guilty could lead to a "substantial prison sentence" and the heavy sentence he ultimately imposed--a sentence larger than the statutory maximum, and fourteen to seventeen times as long as that received by a codefendant who pleaded guilty--amply demonstrated a reasonable likelihood of vindictiveness, particularly since the judge never provided any other explanation for his sentence. And the Court of Appeals' decision here that Longval should be resentenced by the state courts, unlike the relief this Court reversed in Goodwin, had no tendency to

prevent the guilty from being convicted or to interfere with the free play of the adversary system between prosecution and defense.

Argument

I. THE COURT OF APPEALS ACCEPTED ALL STATE COURT FACTUAL FINDINGS, AND THE PETITION'S CLAIM THAT IT DID NOT RAISES NO ISSUE WARRANTING CERTIORARI.

A) This Court Should Not Hear A Claim Which Petitioners Failed to Raise the Last Time They Sought Certiorari.

Petitioners did not ask this Court to consider their claim that the Court of Appeals violated Sumner v. Mata, 449 U.S. 539 (1981) when they last petitioned for certiorari in 1980. The Petitioners were well aware of that claim, since they mentioned it in their petition (pp. 9, 18), but they failed to include it among the questions presented for review. See Petition for Writ of Certiorari, Lawrence R. Meachum v. Norman L. Longval, No. 81-261, pp. i-ii. Still less did they mention their current claim (Pet., pp. 14-16) that the Court of Appeals somehow violated Donnelley v. De Christoforo, 416 U.S. 637 (1974). Indeed, they cited that case neither in their previous petition for certiorari, nor in either of their briefs before the Court of Appeals; their claim based on it is raised for the first time in this Court.

This Court should not welcome repeated, dilatory, unnecessary applications by state officials, any more than it has welcomed efforts by defense counsel or habeas corpus petitioners to reserve some of their claims for another effort. See Wainwright v. Sykes, 433 U.S. 72, 89 (1977) (calling such tactics "sandbagging"); Rose v. Lundy, 102 S.Ct. 1198, 1204-05 (1982). Norman Longval has already served more than seven years (see Pet. App. C, p. 3) of a prison sentence which the Court of Appeals found unconstitutional. Relief may already have been delayed because the Petitioners, when they last sought certiorari, urged on this Court an issue not in fact raised by this case (Pet. App. A, pp. 2-4).*

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* As appears below, the Question Presented in the present Petition (p. i) is also one not present in the case. At no time did the Court of Appeals suggest or apply a test based on "a defendant's subjective perception of possible vindictiveness" (Pet., p. 1). Its test was wholly objective. See Part II(A) of this Opposition, page 8 below.

This Court should not entertain a second application--particularly one which raises no issue of general importance, but merely challenges a federal court's reading of particular state findings.

B) The Court of Appeals Followed Sumner v. Mata.

The Court of Appeals fully accepted the state court assertions that the trial judge's words urging Longval to plead guilty or face a "substantial prison sentence" (Pet. App. D, pp. 6-7) were not a "threat" (Pet. App. C, p. 15; App. D, p. 8):

> We readily accept the master's finding that the trial judge in this case acted with the best of intentions; ut we think it clear that, viewed from the crucial perspective of the defendant, the judge's statement could reasonably have been understood as a threat. Pet. App. B, pp. 6-7.

The Court repeatedly stated that its decision was not based on any improper ntent behind the judge's words but rather on the reasonable likelihood of vindictiveness they--and the ensuing prison sentence--presented to the reasonable observer (Pet. App. A, pp. 4-5; App. B, pp. 5-6). Since the Court accepted all state court findings, there could be no possible violation of Sumner v. Mata, 449 U.S. 539 (1981), or of the statute that case construed, 28 U.S.C. § 2254(d).*

The Court was plainly correct in construing the state opinion to refer at most to the trial judge's intention. The meaning of the trial judge's words is clear:

> Mr. Primason, the evidence in this case as it is coming in is very serious, - robbery of a drug store, taking [i.e. theft of] drugs, use of a shot gun. I am wondering if you and the Commonwealth have had any discussion regarding a plea [of guilty]. I strongly suggest that you ask your client to consider a plea, because, if the jury returns a verdict of guilty, I might be disposed to impose a substantial prison sentence. You know that I am capable of doing that because you know of the sentences in a previous trial. Pet. App. D, pp. 6-7 (bracketed explanations by state court master)

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* The Court willingly applied Sumner only a month before it decided this case, in another appeal raising similar issues. Koski v. Samaha, 648 F.2d 790, 880 (1st Cir. 1980).

By reading the state court opinions to say that no threat was intended, the Court of Appeals reconciled the state court Master's finding with the inescapable meaning of the words the Master had found were used by the trial judge. Indeed, the Master's statement was that nothing led him "to construe the Judge's remarks as in any sense a threat but merely as a staement to a young lawyer of the Judge's then general impression of the evidence" (Pet. App. D, p. 8). This is clearly an assertion about what the judge intended when he spoke during the trial. It is not even a statement about his intent when he imposed the sentence which the Court of Appeals held unconstitutional.

If anything, the Court of Appeals went too far in treating what the state courts said (Pet. App. C, pp. 15-16; App. D, p. 8) as a factual finding, rather than an assertion that the trial judge's language was not unconstitutionally coercive. Since there was no dispute that the trial judge said that, if Longval declined to plead guilty, he was "capable of" imposing "a substantial prison sentence" (Pet. App. D, pp. 6-7), the state courts' remarks were probably directed to whether such a statement was unconstitutionally coercive. If so, the federal courts owed them no deference because they were either conclusions of law or mixed questions of law and fact. Sumner v. Mata, 102 S.Ct. 1303 (1982); Cuyler v. Sullivan, 446 U.S. 335, 341-42 (1980); Brewer v. Williams, 430 U.S. 387, 397 n.4, 403-04 (1977).

The Court of Appeals' decision is just as consistent with Donnelly v. DeChristoforo, 406 U.S. 637 (1974) (cited by the Petition at 14-16) as it is with Sumner v. Mata. Donnelley establishes that a federal court has no power to set aside a state conviction because it considers the prosecutor's comment (even though followed by a curative instruction) improper, without a showing of fundamental error denying due process. Here, the Court of Appeals has not undertaken to regulate the details of a trial. It has rather found that Longval made out a case that he was punished, not just or committing a crime, but also for refusing to forego a trial. That this may not be done is not a novel notion, or one arising out of the Court of Appeals' own theories of fairness, but an established constitutional principle most recently upheld by this Court in United States v. Goodwin,

102 S.Ct. 2485 (1982). If a trial judge may add years or decades to a defendant's sentence because he persists in claiming constitutional rights, those rights will become meaningless indeed.

II. THE COURT OF APPEALS PROPERLY APPLIED UNITED STATES V. GOODWIN TO THE FACTS OF THIS CASE.

A) The Court of Appeals Properly Ruled That a Reasonable Likelihood of Vindictiveness Raises a Presumption of Unconstitutional Punishment, and Never Applied the Subjective Test Alleged by the Petition.

Under Goodwin, a defendant may use either of two ways to establish that he has been unconstitutionally punished for asserting his rights. First, he may show that a judge or prosecutor acted with the actual intention of punishing him. United States v. Goodwin, 102 S.Ct. 2485, 2494 2494 (1982). Second, even if there is no claim of "actual vindictiveness," he may establish a "presumption of vindictiveness" (102 S.Ct. at 2493) by showing "a reasonable likelihood of vindictiveness" (id. at 2489). Accord, Blackledge v. Perry, 417 U.S. 21 (1974); North Carolina v. Pearce, 395 U.S. 71 (1979). That is because "Motives are complex and difficult to prove" (102 S.Ct. at 2489). "And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right . . . , due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." Id. at 2489, quoting North Carolina v. Pearce, 395 U.S. 711, 725 (1969).

The Court of Appeals applied the second of these standards: it found "a reasonable likelihood of vindictiveness" in the circumstances of this case (Pet. App. A, p. 4).* And on remand it made clear that its previous references to a "reasonable apprehension of vindictiveness" (Pet. App. B, pp. 5-6) did not refer to a mere possibility, or a mere apprehension by a suspicious defendant (Pet. App. A, pp. 3-4). As the Court noted, the reasons for allowing a presumption of vindictiveness apply with particular force here:

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* The Commonwealth has never argued that, if there is a presumption of vindictiveness, it has been rebutted.

> A rule which required a defendant to make a prima facie case of actual vindictiveness on the part of a judge, which the Massachusetts court seemingly adopted . . . , even of counsel were willing to suffer the reputation with the bench that this would be likely to give him, would impose an almost impossible burden. Pet. App. A, pp. 10-11.

And of course defendants are especially likely to be deterred from exercising their rights when punishment emanates from a judge, not just a prosecutor (Pet. App. B, p. 6).

Contrary to the Petition's assertion that the Court of Appeals thought that "a defendant's subjective perception of possible vindictiveness is the proper standard" (Pet., p. 1), the Court of Appeals adopted a wholly objective standard. From the outset, its concern was with whether the judge's "remarks could create a '*reasonable* apprehension of vindictiveness'" (Pet. App. B, p. 6; emphasis added), quoting *Blackledge* v. *Perry*, 417 U.S. 21, 28 (1974). On remand, it made clear that this also requires a "reasonable likelihood of vindictiveness" (Pet. App. A, p. 4), quoting *United States* v. *Goodwin*, 102 S.Ct. 2485, 2489 (1982). It said absolutely nothing about the defendant Longval's subjective perceptions. The issue tendered by the Petition (p. 1) is thus not present in this case--any more than was the issue tendered in the Petitioners' previous petition (Pet. App. A, pp. 2-4).

This case simply involves the application of a standard confirmed by this Court within the year to particular and unusual facts. There is no issue of general importance for this Court to review. And the facts, as will now be explained, strongly support the Court of Appeals' conclusion that a reasonable likelihood of vindictiveness has been shown.

B) The Facts Here Amply Establish a Reasonable Likelihood of Vindictiveness.

1. The trial judge's own words (Pet. App. D, pp. 6-7) clearly furnished reasonable grounds for a presumption that he was pursuing "a course of action whose objective is to penalize a person's reliance on his legal rights." *Goodwin*, 102 S.Ct. at 2488 n.4, quoting Bordenkircher v. Hayes, 434 U.S. 357, 363

(1978). As the Court of Appeals said: "The court clearly implied to counsel that it might mete out a substantial prison sentence if Longval did not plead guilty; it pointedly referred to sentences imposed in a previous trial as examples of its capacity to do so." Pet. App. B, pp. 5-6.

2. That the judge used words inappropriate for a judicial officer presiding over a criminal trial reinforces the appearance that punishment, not some more usual and proper function, was in question. This was not the case of a judge or prosecutor simply going about his necessary unctions. Here the judge abandoned his function of presiding impartially over the trial to call on the defendant to surrender his right to a trial or face "a substantial prison sentence" (Pet. App. D, p. 7). Such a call has a huge coercive potential and is in no way consistent with a judge's proper functions. The likelihood is the greater that it typically

improper purpose.

The circumstances of the judge's involvement powerfully support a presumption that the sentence was imposed because Longval declined to accept the judge's call to plead guilty. The judge intervened on his own initiative, there having been no previous plea bargaining involving Longval (Pet. App. D, p. 6). He intervened in the middle of the trial over which he was supposed to be presiding impartially. He spoke during the prosecution's case (Id. at 3), before he had even heard Longval's side of the story, or seen the probation report. He gave a specific example to show what he was "capable of doing" (Id. at 4).When such a judicial summons to plead guilty was not accepted,
little choice but to follow through with a heavy sentence.

To find vindictiveness reasonably probable in cases like this would in no way impinge on legitimate state interests. On the contrary, courts have not hesitated to condemn extraordinary conduct such as what occurred here.* Indeed, some jurisdictions have gone further in

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* E.g., State v. Benfield, 364 N.C. 74, 140 S.E.2d 706 (1965); People v. Clark, 515 P.2d 1241 (Colo. 1973); State v. Svoboda, 205 Neb. 175, 287 N.W.2d 41 (1980); Kelly v. State, 44 Ala. App. 307, 208 S.2d 217 (1968); United States v. Stockwell, 472 F.2d 1186 (9th Cir.), cert. denied, 411 U.S. 948 (1973).

restricting judicial involvement.*

3. The judge imposed a huge, forty to fifty year sentence for involvement in a drugstore robbery in which no one was injured--a sentence which forcefully suggests that special measures were being taken for special purposes. The sentences exceeded a statutory maximum. Pet. App. B, p. 2. It imposed consecutive terms for charges included in the main count. Pet. App. A, pp. 6-7. It was far larger than the average sentences which Massachusetts gives even to defendants with criminal records found guilty after trial of crimes of personal violence. Zeisel & Diamond, Search for Sentencing Equity: Sentence Review in Massachusetts and Connecticut, 1977 Amer. Bar Found. Res. J. 881, 932 (rape, prior record: 10 years; assault and battery with deadly weapon, jury conviction, prior prison record: 8 years; sum of average for manslaughter and average for robbery, major record: 14 years). This was no mere denial of leniency to an uncooperative defendant, but a punishment of decades in prison.

That the judge sentenced Longval to spend more than thirteen times as many years in prison as his codefendant who pleaded guilty further buttresses the presumption that Longval was punished for claiming a trial, not just for committing a crime. Longval was sentenced to forty to fifty years in prison, Ellard to three years in a house of correction and three years of probation (Pet. App. B, p. 2). Discrepancies far smallher have prompted appellate courts to call for explanations. United States v. Stockwell, 472 F.2d 1186 (9th Cir.), cert. denied, 411 U.S. 948 (1973); United States v. Capriola, 537 F.2d 319 (9th Cir. 1976). Although Longval had a longer criminal record than Ellard, Ellard was no stranger to the courts. Ellard volunteered to participate in the robbery (Tr. 198-99), owned the gun (Tr. 201), and was apparently the person who fired it (E.g., Tr. 200-201). Yet the judge gave Longval a prison sentence 38 to 47 years longer than Ellard's.

A massive discrepancy like this one declares unequivocally that those who persist to exercise their rights will be punished. It coerces

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* E.g., Commonwealth v. Evans, 434 Pa. 52, 252 A.2d 689 (1969); State v. Buckalew, 561 P.2d 289 (Alas. 1977); State v. Cross, 270 S.C. 44, 240 S.E.2d 514 (1977); Regina v. Turner, (1970) 2 Q.B. 321 (C.A.) (England); Fed. R. Crim. P. 11(e)(1); A.B.A. Standards for Criminal Justice, Standard 14-3, 3(c-f) (2d ed. 1980).

the innocent as well as the guilty to plead guilty when the judge asks them. See United States v. Porter, 513 F. Supp. 245 (M.D. Tenn. 1981); McCoy & Mirra, Plea Bargaining as Due Process in Determining Guilt, 32 Stan. L. Rev. 887, 926-30 (1980). And the discrepancy was far larger than any valid state interest in encouraging guilty pleas could explain. Even the most dramatic reports on plea bargaining describe sentence ratios of about two or three to one between defendants conficted after trial and those pleading guilty.* The decades of additional imprisonment heaped on Longval served no valid state purpose, and can only be construed as punishment for insisting that he be tried before being sentenced.

4. The nonpunitive ground traditionally invoked to justify longer sentences for those who do not plead guilty is absent from this case. Longval freely admitted his guilt on the stand (Pet. App. C, p. 11). He showed that he was like a defendant "who demonstrates by this plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over shorter periods of time than might otherwise be necessary." Brady v. United States, 397 U.S. 742, 753 (1970). The judge's sentence cannot therefore be explained on the theory that one who admits guilt deserves a lesser sentence than one who falsely denies it. Indeed, Longval's admissions were particularly sincere because they were made without a bargain, solely to establish the innocence of his codefendant Golden (who was then acquitted; Pet. App. C, p. 3). Most plea bargaining defendants, by contrast, admit their guilt only for the purpose of the bargain, and deny it again afterwards. A. Blumberg, Criminal Justice 89-91 (1967). There is thus a reasonable likelihood that the judge imposed a huge sentence, not because Longval was unwilling to admit his deeds, but because he was unwilling to surrender his right to a trial.

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* Zeisel, The Disposition of Felony Arrests, 1981 Amer. Bar Found. Res. J. 407, 448-49; Uhlman & Walker, "He Takes Some of My Time; I Take Some of His": An Analysis of Judicial Sentencing Patterns in Jury Cases, 14 L. & Soc'y Rev. 323, 328 (1980); Admin. Office of the U.S. Courts, Federal Offenders in the United States District Courts, 1971, at 13 (1973); Shin, Do Lesser Pleas Pay?: Accommodations in the Sentencing and Parole Processes, 1 J. Crim. Justice 27, 32 (1973); Cook, Sentencing Behavior of Federal Judges: Draft Cases--1972, 42 U. Cin. L. Rev. 597, 609 (1973).

5. The powerful evidence of punishment in this record is wholly unrebutted by anything said by the trial judge. The judge gave no explanation whatever for the sentence (Tr. 280-82). That is, he gave no explanation except for his original statement during the trial, warning that, if there were no plea and Longval was convicted, he "might be disposed to impose a substantial prison sentence" (Pet. App. D, pp. 6-7). A reasonable observer could scarcely help concluding that the judge did what he said he would do.

C. The Practical Considerations Supporting This Court's Goodwin Decision Are Absent Here.

The decision which this Court reversed in Goodwin would have seriously obstructed the conviction of the guilty. The Court of Appeals there held that a prosecutor could not bring a new charge after a defendant claimed a jury trial unless she could educe objective evidence that the charge could not have been brought before. 102 S.Ct. at 2488. That would "block a legitimate response to criminal conduct." 102 S.Ct. at 2489. And it would encourage prosecutors to assert every charge in the book at the outset, regardless of the warrant for it, lest they be later barred from adding new charges. Id. at 2493 n.14.

This case involves no such problem. The Court of Appeals' decision does not require the abandonment of a charge of which Longval is guilty, but only that he be resentenced to whatever term the state courts think is appropriate, eithout punishment for his insistence on being tried. And even this mild remedy can be avoided in the future if judges refrain from extraordinary proposals such as the one advanced during Longval's trial.

Goodwin also threatened an unwarranted incursion on pretrial give and take, including but not limited to plea bargaining. As this Court noted, pretrial negotiation and changes of position among opposing counsel are routine. They warrant no inference of punishment, improve the administration of justice, and often benefit defendants. 102 S.Ct. at 2491-93. Treating such interplay between equals as punitive would without reason hamper the adversary system.

Again, this case is very different. A judge is not the equal of counsel in bargaining power. A judge is not supposed to participate in a

case as an adversary or negotiator. The middle of a trial--and still more so the sentencing hearing--is not the time for judicial maneuvering, but for judicial protection of the rights of all parties.

In Goodwin, lastly, there was no direct evidence that the prosecutor increased the charges because Goodwin claimed a jury trial, and much evidence that he did not. The prosecutor explained why he brought new charges. 102 S.Ct. at 2488 n.2. The original crime had been far more serious than the misdemeanor and petty offense charges originally brought: Goodwin had escaped from custody when a police officer was apparently on the verge of discovering evidence of major narcotics violations, in the process hitting the officer with his car and knocking him onto the highway. Later, Goodwin had apparently perjured himself at the preliminary hearing, and then absconded for three years. When, in the ordinary course of events, the case was assigned to a higher ranking attorney, there was no need to search for a punitive explanation for this attorney's decision to bring new charges raising the possible sentence from two and a third to fifteen years.* 102 S.Ct. at 2487-88 & n.2. What is surprising is that higher charges had not been brought long before.

In this case, by contrast, Longval received a huge sentence, for which the judge gave no contemporaneous or later explanation whatsoever. The only explanation the judge gave was his midtrial proposal that Longval plead guilty or face "a substantial prison sentence" (Pet. App. D, pp. 6-7). That statement provides precisely the direct evidence of a link between Longval's refusal to waive his rights and his sentence that was missing in Goodwin. See 102 S.Ct. at 2493. Together with the sentence later imposed and the other circumstances of the case, it provides ample support for the Court of Appeals' conclusion that Longval demonstrated a reasonable likelihood of vindictiveness.

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* The sentence actually imposed on Goodwin totalled six years. United States v. Goodwin, S.Ct. No. 80-2195, Joint Appendix at 7-8.

Conclusion

If a judge is free to initiate plea bargaining during trial, urge a defendant to plead guilty, announce that failure to do so will lead to a substantial sentence, and then condemn him to literally decades in prison, the constitutional right to be tried before being sentenced will be of little avail. The facts of this case leave little room for doubt that Norman Longval will be in prison for what may well be the rest of his life, not because he committed a crime, but because he thought he had constitutional rights.* Certainly there is a "reasonable likelihood" that this happened. The function of a federal habeas corpus court is precisely to grant relief in extraordinary cases such as this one, so that the promises of the Bill of Rights remain alive in the trial courts. And since the Court of Appeals applied to unusual facts precisely the standards which this Court has recognized in United States v. Goodwin and its precursors, this case poses no issue of general importance. This Court should therefore deny certiorari and let Longval be resentenced in the state courts to whatever term he may deserve, rather than accepting the Petition's bid to extend this litigation still further.

Respectfully submitted,

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* Longval will not be eligible for parole until he serves two thirds of his sentence, unless an improbable collection of officials unites to recommend it. Mass. G.L. c. 127, sec. 133(a). He was thirty-six years old when sentenced in 1975, seven years ago. Tr. 277-78.

No. 82-1157

In the Supreme Court of the United States

October Term, 1982

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Petitioners,

v.

NORMAN L. LONGVAL,

Respondent

On Petition for Certiorari to the United States Court of Appeals

for the First Circuit

RESPONDENT'S OPPOSITION TO PETITION FOR CERTIORARI

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No. 82-1157

In the Supreme Court of the United States

October Term, 1982

LAWRENCE R. MEACHUM, et al.,

Petitioners

v.

NORMAN L. LONGVAL,

Respondent

Respondent's Opposition to Petition for Certiorari

Respondent Norman Longval urges that certiorari not be granted, for the following reasons.

Statement of the Case: Omitted Facts

The Statement in the Petition does not state the Court of Appeals' grounds for holding Respondent Longval's sentence unconstitutional. That court (composed of Chief Judge Coffin and Judges Aldrich and Bownes) relied on the principle that "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." Pet. App. B., p. 4, quoting Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978). The Court of Appeals, in brief, held that Longval received an unusually long prison term because he rejected the trial judge's call that he surrender his right to be tried before being sentenced. It noted that during his trial, before Longval had an opportunity to present evidence, "The court clearly implied to counsel that it might mete out a substantial prison sentence if Longval did not plead guilty; it pointedly referred to sentences imposed in a previous trial as examples of its capacity to do so." Pet. App. B, pp. 3, 5-6.* Longval did not plead guilty but admitted his guilt on the stand and was convicted (Pet. App. C, p. 11).

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* The trial judge's words, as found by the state court, may be found at Pet. App. D, pp. 6-7, in the Petition at pages 6-7, and at page 5 of this Opposition. Longval's counsel reported the judge's words to Longval. Pet. App. D, pp. 9-10.

The judge, who had "strongly suggest[ed]" a plea (Pet. App. D, p. 6) then gave Longval sentences amounting to forty to fifty years in Walpole State Prison (Pet. App. C, p. 3). On these facts, the Court of Appeals accepted the state court's findings that the trial judge spoke without improper intent, but held that his words nevertheless created "a reasonable apprehension of vindictiveness" which unconstitutionally tainted the sentence, and required resentencing (Pet. App. B, pp. 6-7).

The Court of Appeals further explained its reasoning after this Court remanded for reconsideration in light of United States v. Goodwin, 102 S.Ct. 2495 (1982). It stated that:

> We fully accept the Court's guidance in Goodwin that recovery on the basis of a reasonable apprehension of vindictiveness also requires that the situation be one in which, in general, there is a "reasonable likelihood of vindictiveness," and we reaffirm our conclusion that this was such a situation.

The Court clarified the limits of its holding by noting that "The judge had not been asked by defense counsel for his views, nor were they interjected into any plea bargaining conference" (Pet. App. A, p. 5)* and distinguished "this case from one in which a judge merely inquired of counsel whether he had considered plea bargaining." (Pet. App. A, p. 10). The Court of Appeals emphasized that the trial judge's forty to fifty year sentence had exceeded the statutory maximum,** that Longval's codefendant who pleaded guilty received a prison sentence of only three years (followed by three years probation), that the trial judge gave no explanation for his sentence, and that the judge imposed consecutive sentences for charges basically included in the same offense (Pet. App. A, pp. 6-8). (All the charges arouse out of the same pharmacy robbery, during which no one was injured. Pet. App. C, pp. 6-7, 10-11). The Court of Appeals noted that the Commonwealth, in its

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* There was no plea bargaining involving Longval at any time (Pet. App. A, p. 3; App. D, p. 9).

** The Massachusetts Appellate Division later reduced Longval's sentence to thirty to forty years; the Petition does not contest the Court of Appeals' conclusion that this does not wipe out any original violation (Pet. App. B, pp. 2, 7).

previous petition for certiorari which led to the remand, had "seized upon" a "collateral remark" in the Court of Appeals' previous opinion, presenting to this Court an issue not really present in the case (Pet. App. A, pp. 2-3).

Summary of Argument

The Court of Appeals fully accepted the state courts' assertion that the trial judge's comments urging Longval to plead guilty or face a "substantial prison sentence" were not a "threat." The Court was thus in full accord with Sumner v. Mata, 449 U.S. 539 (1981). The Court's construction of the state courts' statement that there was no "threat" as meaning that the judge had no improper intent was also warranted. Even were it not, the only alternative reading would be that the judge's comments were not unconstitutionally coercive, which is a conclusion of law to which the Court of Appeals owed no deference. In any event, this Court should not grant certiorari just to consider whether the Court of Appeals correctly construed the state court opinions, particularly since the Petitioners failed to include that issue among the questions presented the last time they sought certiorari.

The issue which this Court remanded to the Court of Appeals for reconsideration--the applicability of United States v. Goodwin, 102 S.Ct. 2485 (1982) to this case--was correctly resolved below. That Court applied to the unusual facts of this case the rule recognized by Goodwin: that a defendant can establish a presumption that he was punished for asserting his rights by proving a "reasonable likelihood of vindictiveness" even though he cannot prove that the judge or prosecutor in question acted with actual vindictive intent. Here, the judge's uninvited assertion that failure to plead guilty could lead to a "substantial prison sentence" and the heavy sentence he ultimately imposed--a sentence larger than the statutory maximum, and fourteen to seventeen times as long as that received by a codefendant who pleaded guilty--amply demonstrated a reasonable likelihood of vindictiveness, particularly since the judge never provided any other explanation for his sentence. And the Court of Appeals' decision here that Longval should be resentenced by the state courts, unlike the relief this Court reversed in Goodwin, had no tendency to

prevent the guilty from being convicted or to interfere with the free play of the adversary system between prosecution and defense.

Argument

I. THE COURT OF APPEALS ACCEPTED ALL STATE COURT FACTUAL FINDINGS, AND THE PETITION'S CLAIM THAT IT DID NOT RAISES NO ISSUE WARRANTING CERTIORARI.

A) This Court Should Not Hear A Claim Which Petitioners Failed to Raise the Last Time They Sought Certiorari.

Petitioners did not ask this Court to consider their claim that the Court of Appeals violated Sumner v. Mata, 449 U.S. 539 (1981) when they last petitioned for certiorari in 1980. The Petitioners were well aware of that claim, since they mentioned it in their petition (pp. 9, 18), but they failed to include it among the questions presented for review. See Petition for Writ of Certiorari, Lawrence R. Meachum v. Norman L. Longval, No. 81-261, pp. i-ii. Still less did they mention their current claim (Pet., pp. 14-16) that the Court of Appeals somehow violated Donnelley v. De Christoforo, 416 U.S. 637 (1974). Indeed, they cited that case neither in their previous petition for certiorari, nor in either of their briefs before the Court of Appeals; their claim based on it is raised for the first time in this Court.

This Court should not welcome repeated, dilatory, unnecessary applications by state officials, any more than it has welcomed efforts by defense counsel or habeas corpus petitioners to reserve some of their claims for another effort. See Wainwright v. Sykes, 433 U.S. 72, 89 (1977) (calling such tactics "sandbagging"); Rose v. Lundy, 102 S.Ct. 1198, 1204-05 (1982). Norman Longval has already served more than seven years (see Pet. App. C, p. 3) of a prison sentence which the Court of Appeals found unconstitutional. Relief may already have been delayed because the Petitioners, when they last sought certiorari, urged on this Court an issue not in fact raised by this case (Pet. App. A, pp. 2-4).*

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* As appears below, the Question Presented in the present Petition (p. i) is also one not present in the case. At no time did the Court of Appeals suggest or apply a test based on "a defendant's subjective perception of possible vindictiveness" (Pet., p. i). Its test was wholly objective. See Part II(A) of this Opposition, page 8 below.

This Court should not entertain a second application--particularly one which raises no issue of general importance, but merely challenges a federal court's reading of particular state findings.

B) The Court of Appeals Followed Sumner v. Mata.

The Court of Appeals fully accepted the state court assertions that the trial judge's words urging Longval to plead guilty or face a "substantial prison sentence" (Pet. App. D, pp. 6-7) were not a "threat" (Pet. App. C, p. 15; App. D, p. 8):

> We readily accept the master's finding that the trial judge in this case acted with the best of intentions; ut we think it clear that, viewed from the crucial perspective of the defendant, the judge's statement could reasonably have been understood as a threat. Pet. App. B, pp. 6-7.

The Court repeatedly stated that its decision was not based on any improper ntent behind the judge's words but rather on the reasonable likelihood of vindictiveness they--and the ensuing prison sentence--presented to the reasonable observer (Pet. App. A, pp. 4-5; App. B, pp. 5-6). Since the Court accepted all state court findings, there could be no possible violation of Sumner v. Mata, 449 U.S. 539 (1981), or of the statute that case construed, 28 U.S.C. § 2254(d).*

The Court was plainly correct in construing the state opinion to refer at most to the trial judge's intention. The meaning of the trial judge's words is clear:

> Mr. Primason, the evidence in this case as it is coming in is very serious, - robbery of a drug store, taking [i.e. theft of] drugs, use of a shot gun. I am wondering if you and the Commonwealth have had any discussion regarding a plea [of guilty]. I strongly suggest that you ask your client to consider a plea, because, if the jury returns a verdict of guilty, I might be disposed to impose a substantial prison sentence. You know that I am capable of doing that because you know of the sentences in a previous trial. Pet. App. D, pp. 6-7 (bracketed explanations by state court master)

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* The Court willingly applied Sumner only a month before it decided this case, in another appeal raising similar issues. Koski v. Samaha, 648 F.2d 790, 880 (1st Cir. 1980).

By reading the state court opinions to say that no threat was intended, the Court of Appeals reconciled the state court Master's finding with the inescapable meaning of the words the Master had found were used by the trial judge. Indeed, the Master's statement was that nothing led him "to construe the Judge's remarks as in any sense a threat but merely as a staement to a young lawyer of the Judge's then general impression of the evidence" (Pet. App. D, p. 8). This is clearly an assertion about what the judge intended when he spoke during the trial. It is not even a statement about his intent when he imposed the sentence which the Court of Appeals held unconstitutional.

If anything, the Court of Appeals went too far in treating what the state courts said (Pet. App. C, pp. 15-16; App. D, p. 8) as a factual finding, rather than an assertion that the trial judge's language was not unconstitutionally coercive. Since there was no dispute that the trial judge said that, if Longval declined to plead guilty, he was "capable of" imposing "a substantial prison sentence" (Pet. App. D, pp. 6-7), the state courts' remarks were probably directed to whether such a statement was unconstitutionally coercive. If so, the federal courts owed them no deference because they were either conclusions of law or mixed questions of law and fact. Sumner v. Mata, 102 S.Ct. 1303 (1982); Cuyler v. Sullivan, 446 U.S. 335, 341-42 (1980); Brewer v. Williams, 430 U.S. 387, 397 n.4, 403-04 (1977).

The Court of Appeals' decision is just as consistent with Donnelly v. DeChristoforo, 406 U.S. 637 (1974) (cited by the Petition at 14-16) as it is with Sumner v. Mata. Donnelley establishes that a federal court has no power to set aside a state conviction because it considers the prosecutor's comment (even though followed by a curative instruction) improper, without a showing of fundamental error denying due process. Here, the Court of Appeals has not undertaken to regulate the details of a trial. It has rather found that Longval made out a case that he was punished, not just or committing a crime, but also for refusing to forego a trial. That this may not be done is not a novel notion, or one arising out of the Court of Appeals' own theories of fairness, but an established constitutional principle most recently upheld by this Court in United States v. Goodwin,

102 S.Ct. 2485 (1982). If a trial judge may add years or decades to a defendant's sentence because he persists in claiming constitutional rights, those rights will become meaningless indeed.

II. THE COURT OF APPEALS PROPERLY APPLIED UNITED STATES V. GOODWIN TO THE FACTS OF THIS CASE.

A) The Court of Appeals Properly Ruled That a Reasonable Likelihood of Vindictiveness Raises a Presumption of Unconstitutional Punishment, and Never Applied the Subjective Test Alleged by the Petition.

Under Goodwin, a defendant may use either of two ways to establish that he has been unconstitutionally punished for asserting his rights. First, he may show that a judge or prosecutor acted with the actual intention of punishing him. United States v. Goodwin, 102 S.Ct. 2485, 2494 2494 (1982). Second, even if there is no claim of "actual vindictiveness," he may establish a "presumption of vindictiveness" (102 S.Ct. at 2493) by showing "a reasonable likelihood of vindictiveness" (id. at 2489). Accord, Blackledge v. Perry, 417 U.S. 21 (1974); North Carolina v. Pearce, 395 U.S. 7[illegible] (1979). That is because "Motives are complex and difficult to prove" (102 S.Ct. at 2489). "And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right . . . , due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." Id. at 2489, quoting North Carolina v. Pearce, 395 U.S. 711, 725 (1969).

The Court of Appeals applied the second of these standards: it found "a reasonable likelihood of vindictiveness" in the circumstances of this case (Pet. App. A, p. 4).* And on remand it made clear that its previous references to a "reasonable apprehension of vindictiveness" (Pet. App. B, pp. 5-6) did not refer to a mere possibility, or a mere apprehension by a suspicious defendant (Pet. App. A, pp. 3-4). As the Court noted, the reasons for allowing a presumption of vindictiveness apply with particular force here:

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* The Commonwealth has never argued that, if there is a presumption of vindictiveness, it has been rebutted.

> A rule which required a defendant to make a prima facie case of actual vindictiveness on the part of a judge, which the Massachusetts court seemingly adopted . . . , even of counsel were willing to suffer the reputation with the bench that this would be likely to give him, would impose an almost impossible burden. Pet. App. A, pp. 10-11.

And of course defendants are especially likely to be deterred from exercising their rights when punishment emanates from a judge, not just a prosecutor (Pet. App. B, p. 6).

Contrary to the Petition's assertion that the Court of Appeals thought that "a defendant's subjective perception of possible vindictiveness is the proper standard" (Pet., p. i), the Court of Appeals adopted a wholly objective standard. From the outset, its concern was with whether the judge's "remarks could create a '<u>reasonable</u> apprehension of vindictiveness'" (Pet. App. B, p. 6; emphasis added), quoting <u>Blackledge</u> v. <u>Perry</u>, 417 U.S. 21, 28 (1974). On remand, it made clear that this also requires a "reasonable likelihood of vindictiveness" (Pet. App. A, p. 4), quoting <u>United States</u> v. <u>Goodwin</u>, 102 S.Ct. 2485, 2489 (1982). It said absolutely nothing about the defendant Longval's subjective perceptions. The issue tendered by the Petition (p. i) is thus not present in this case--any more than was the issue tendered in the Petitioners' previous petition (Pet. App. A, pp. 2-4).

This case simply involves the application of a standard confirmed by this Court within the year to particular and unusual facts. There is no issue of general importance for this Court to review. And the facts, as will now be explained, strongly support the Court of Appeals' conclusion that a reasonable likelihood of vindictiveness has been shown.

B) The Facts Here Amply Establish a Reasonable Likelihood of Vindictiveness.

1. The trial judge's own words (Pet. App. D, pp. 6-7) clearly furnished reasonable grounds for a presumption that he was pursuing "a course of action whose objective is to penalize a person's reliance on his legal rights." <u>Goodwin</u>, 102 S.Ct. at 2488 n.4, quoting Bordenkircher v. Hayes, 434 U.S. 357, 363

(1978). As the Court of Appeals said: "The court clearly implied to counsel that it might mete out a substantial prison sentence if Longval did not plead guilty; it pointedly referred to sentences imposed in a previous trial as examples of its capacity to do so." Pet. App. B, pp. 5-6.

2. That the judge used words inappropriate for a judicial officer presiding over a criminal trial reinforces the appearance that punishment, not some more usual and proper function, was in question. This was not the case of a judge or prosecutor simply going about his necessary unctions. Here the judge abandoned his function of presiding impartially over the trial to call on the defendant to surrender his right to a trial or face "a substantial prison sentence" (Pet. App. D, p. 7). Such a call has a huge coercive potential and is in no way consistent with a judge's proper functions. The likelihood is the greater that it typically

improper purpose.

The circumstances of the judge's involvement powerfully support a presumption that the sentence was imposed because Longval declined to accept the judge's call to plead guilty. The judge intervened on his own initiative, there having been no previous plea bargaining involving Longval (Pet. App. D, p. 6). He intervened in the middle of the trial over which he was supposed to be presiding impartially. He spoke during the prosecution's case (Id. at 3), before he had even heard Longval's side of the story, or seen the probation report. He gave a specific example to show what he was "capable of doing" (Id. at 4).When such a judicial summons to plead guilty was not accepted,
little choice but to follow through with a heavy sentence.

To find vindictiveness reasonably probable in cases like this would in no way impinge on legitimate state interests. On the contrary, courts have not hesitated to condemn extraordinary conduct such as what occurred here.* Indeed, some jurisdictions have gone further in

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* E.g., State v. Benfield, 364 N.C. 74, 140 S.E.2d 706 (1965); People v. Clark, 515 P.2d 1241 (Colo. 1973); State v. Svoboda, 205 Neb. 175, 287 N.W.2d 41 (1980); Kelly v. State, 44 Ala. App. 307, 208 S.2d 217 (1968); United States v. Stockwell, 472 F.2d 1186 (9th Cir.), cert. denied, 411 U.S. 948 (1973).

restricting judicial involvement.*

3. The judge imposed a huge, forty to fifty year sentence for involvement in a drugstore robbery in which no one was injured--a sentence which forcefully suggests that special measures were being taken for special purposes. The sentences exceeded a statutory maximum. Pet. App. B, p. 2. It imposed consecutive terms for charges included in the main count. Pet. App. A, pp. 6-7. It was far larger than the average sentences which Massachusetts gives even to defendants with criminal records found guilty after trial of crimes of personal violence. Zeisel & Diamond, Search for Sentencing Equity: Sentence Review in Massachusetts and Connecticut, 1977 Amer. Bar Found. Res. J. 881, 932 (rape, prior record: 10 years; assault and battery with deadly weapon, jury conviction, prior prison record: 8 years; sum of average for manslaughter and average for robbery, major record: 14 years). This was no mere denial of leniency to an uncooperative defendant, but a punishment of decades in prison.

That the judge sentenced Longval to spend more than thirteen times as many years in prison as his codefendant who pleaded guilty further buttresses the presumption that Longval was punished for claiming a trial, not just for committing a crime. Longval was sentenced to forty to fifty years in prison, Ellard to three years in a house of correction and three years of probation (Pet. App. B, p. 2). Discrepancies far smallher have prompted appellate courts to call for explanations. United States v. Stockwell, 472 F.2d 1186 (9th Cir.), cert. denied, 411 U.S. 948 (1973); United States v. Capriola, 537 F.2d 319 (9th Cir. 1976). Although Longval had a longer criminal record than Ellard, Ellard was no stranger to the court. Ellard volunteered to participate in the robbery (Tr. 198-99), owned the gun (Tr. 201), and was apparently the person who fired it (E.g., Tr. 200-201). Yet the judge gave Longval a prison sentence 38 to 47 years longer than Ellard's.

A massive discrepancy like this one declares unequivocally that those who persist to exercise their rights will be punished. It coerces

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* E.g., Commonwealth v. Evans, 434 Pa. 52, 252 A.2d 689 (1969); State v. Buckalew, 561 P.2d 289 (Alas. 1977); State v. Cross, 270 S.C. 44, 240 S.E.2d 514 (1977); Regina v. Turner, (1970) 2 Q.B. 321 (C.A.) (England); Fed. R. Crim. P. 11(e)(1); A.B.A. Standards for Criminal Justice, Standard 14-3, 3(c-f) (2d ed. 1980).

the innocent as well as the guilty to plead guilty when the judge asks them. See United States v. Porter, 513 F. Supp. 245 (M.D. Tenn. 1981); McCoy & Mirra, Plea Bargaining as Due Process in Determining Guilt, 32 Stan. L. Rev. 887, 926-30 (1980). And the discrepancy was far larger than any valid state interest in encouraging guilty pleas could explain. Even the most dramatic reports on plea bargaining describe sentence ratios of about two or three to one between defendants conficted after trial and those pleading guilty.* The decades of additional imprisonment heaped on Longval served no valid state purpose, and can only be construed as punishment for insisting that he be tried before being sentenced.

4. The nonpunitive ground traditionally invoked to justify longer sentences for those who do not plead guilty is absent from this case. Longval freely admitted his guilt on the stand (Pet. App. C, p. 11). He showed that he was like a defendant "who demonstrates by this plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over shorter periods of time than might otherwise be necessary." Brady v. United States, 397 U.S. 742, 753 (1970). The judge's sentence cannot therefore be explained on the theory that one who admits guilt deserves a lesser sentence than one who falsely denies it. Indeed, Longval's admissions were particularly sincere because they were made without a bargain, solely to establish the innocence of his codefendant Golden (who was then acquitted; Pet. App. C, p. 3). Most plea bargaining defendants, by contrast, admit their guilt only for the purpose of the bargain, and deny it again afterwards. A. Blumberg, Criminal Justice 89-91 (1967). There is thus a reasonable likelihood that the judge imposed a huge sentence, not because Longval was unwilling to admit his deeds, but because he was unwilling to surrender his right to a trial.

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* Zeisel, The Disposition of Felony Arrests, 1981 Amer. Bar Found. Res. J. 407, 448-49; Uhlman & Walker, "He Takes Some of My Time; I Take Some of His": An Analysis of Judicial Sentencing Patterns in Jury Cases, 14 L. & Soc'y Rev. 323, 328 (1980); Admin. Office of the U.S. Courts, Federal Offenders in the United States District Courts, 1971, at 13 (1973); Shin, Do Lesser Pleas Pay?: Accommodations in the Sentencing and Parole Processes, 1 J. Crim. Justice 27, 32 (1973); Cook, Sentencing Behavior of Federal Judges: Draft Cases--1972, 42 U. Cin. L. Rev. 597, 609 (1973).

5. The powerful evidence of punishment in this record is wholly unrebutted by anything said by the trial judge. The judge gave no explanation whatever for the sentence (Tr. 280-82). That is, he gave no explanation except for his original statement during the trial, warning that, if there were no plea and Longval was convicted, he "might be disposed to impose a substantial prison sentence" (Pet. App. D, pp. 6-7). A reasonable observer could scarcely help concluding that the judge did what he said he would do.

C. The Practical Considerations Supporting This Court's Goodwin Decision Are Absent Here.

The decision which this Court reversed in Goodwin would have seriously obstructed the conviction of the guilty. The Court of Appeals there held that a prosecutor could not bring a new charge after a defendant claimed a jury trial unless she could educe objective evidence that the charge could not have been brought before. 102 S.Ct. at 2488. That would "block a legitimate response to criminal conduct." 102 S.Ct. at 2489. And it would encourage prosecutors to assert every charge in the book at the outset, regardless of the warrant for it, lest they be later barred from adding new charges. Id. at 2493 n.14.

This case involves no such problem. The Court of Appeals' decision does not require the abandonment of a charge of which Longval is guilty, but only that he be resentenced to whatever term the state courts think is appropriate, without punishment for his insistence on being tried. And even this mild remedy can be avoided in the future if judges refrain from extraordinary proposals such as the one advanced during Longval's trial.

Goodwin also threatened an unwarranted incursion on pretrial give and take, including but not limited to plea bargaining. As this Court noted, pretrial negotiation and changes of position among opposing counsel are routine. They warrant no inference of punishment, improve the administration of justice, and often benefit defendants. 102 S.Ct. at 2491-93. Treating such interplay between equals as punitive would without reason hamper the adversary system.

Again, this case is very different. A judge is not the equal of counsel in bargaining power. A judge is not supposed to participate in a

case as an adversary or negotiator. The middle of a trial--and still more so the sentencing hearing--is not the time for judicial maneuvering, but for judicial protection of the rights of all parties.

In Goodwin, lastly, there was no direct evidence that the prosecutor increased the charges because Goodwin claimed a jury trial, and much evidence that he did not. The prosecutor explained why he brought new charges. 102 S.Ct. at 2488 n.2. The original crime had been far more serious than the misdemeanor and petty offense charges originally brought: Goodwin had escaped from custody when a police officer was apparently on the verge of discovering evidence of major narcotics violations, in the process hitting the officer with his car and knocking him onto the highway. Later, Goodwin had apparently perjured himself at the preliminary hearing, and then absconded for three years. When, in the ordinary course of events, the case was assigned to a higher ranking attorney, there was no need to search for a punitive explanation for this attorney's decision to bring new charges raising the possible sentence from two and a third to fifteen years.* 102 S.Ct. at 2487-88 & n.2. What is surprising is that higher charges had not been brought long before.

In this case, by contrast, Longval received a huge sentence, for which the judge gave no contemporaneous or later explanation whatsoever. The only explanation the judge gave was his midtrial proposal that Longval plead guilty or face "a substantial prison sentence" (Pet. App. D, pp. 6-7). That statement provides precisely the direct evidence of a link between Longval's refusal to waive his rights and his sentence that was missing in Goodwin. See 102 S.Ct. at 2493. Toghether with the sentence later imposed and the other circumstances of the case, it provides ample support for the Court of Appeals' conclusion that Longval demonstrated a reasonable likelihood of vindictiveness.

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* The sentence actually imposed on Goodwin totalled six years. United States v. Goodwin, S.Ct. No. 80-2195, Joint Appendix at 7-8.

Conclusion

If a judge is free to initiate plea bargaining during trial, urge a defendant to plead guilty, announce that failure to do so will lead to a substantial sentence, and then condemn him to literally decades in prison, the constitutional right to be tried before being sentenced will be of little avail. The facts of this case leave little room for doubt that Norman Longval will be in prison for what may well be the rest of his life, not because he committed a crime, but because he thought he had constitutional rights.* Certainly there is a "reasonable likelihood" that this happened. The function of a federal habeas corpus court is precisely to grant relief in extraordinary cases such as this one, so that the promises of the Bill of Rights remain alive in the trial courts. And since the Court of Appeals applied to unusual facts precisely the standards which this Court has recognized in United States v. Goodwin and its precursors, this case poses no issue of general importance. This Court should therefore deny certiorari and let Longval be resentenced in the state courts to whatever term he may deserve, rather than accepting the Petition's bid to extend this litigation still further.

Respectfully submitted,

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Counsel for Respondent Norman Longval

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* Longval will not be eligible for parole until he serves two thirds of his sentence, unless an improbable collection of officials unites to recommend it. Mass. G.L. c. 127, sec. 133(a). He was thirty-six years old when sentenced in 1975, seven years ago. Tr. 277-78.

ORIGINAL

No. 82-1157

In the Supreme Court of the United States

October Term, 1982

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SUPREME COURT, U.S.

LAWRENCE R. MEACHUM, et al.,

Petitioners

v.

NORMAN L. LONGVAL,

Respondent

Respondent's Motion for Leave to Proceed in Forma Pauperis

Pursuant to Supreme Court Rule 46, Respondent Norman L. Longval moves for leave to proceed in forma pauperis, without prepayment of fees or costs and without printing his brief. In support of this motion, the undersigned represents: that Respondent was allowed to proceed in forma pauperis in the U.S. District Court for the District of Massachusetts, in the U.S. Court of Appeals for the First Circuit, and in this Court on a previous petition for certiorari (No. 81-261); that the undersigned was appointed by the Court of Appeals to represent Respondent, and is doing so without fee; and that the Respondent's affidavit in support of this motion is attached hereto.

Respectfully submitted,

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Counsel for Respondent

AFFIDAVIT TO ACCOMPANY MOTION FOR LEAVE

TO APPEAL IN FORMA PAUPERIS

IN THE SUPREME COURT OF THE UNITED STATES

LAWRENCE R. MEACHUM

v.

NORMAN L. LONGVAL

Affidavit in Support of Motion to Proceed in Forma Pauperis

I, Norman Longval, being first duly sworn, depose and say that I am the Respondent in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor or to print my brief, I state that because of my poverty I am unable to pay the costs of proceeding in this Court or to give security therefor; that I believe I am entitled to redress; and that I desire to oppose the petition for certiorari in this case and the petitioner's claims there presented, for reasons set forth in my brief in opposition.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? NO — A PRISONER

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? NO

   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account?

   a. If the answer is yes, state the total value of the items owned. Approx $35.00

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? N/O

   a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Norman Longval

SUBSCRIBED AND SWORN TO before me this _____ of December, 1982

Notary Public

Arthur D. Gauthier
Notary Public